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FOREWORD

When putting together the Journal, we tend not to seek a specific theme. However, on this 150th anniversary of the coming into force of Macaulay's Indian Penal Code in 1862, we could not but seek a piece on this key code in Commonwealth law. Indeed, we include two excellent articles on the subject, by pre-eminent authors in the field: Barry Wright's (at p.25, *post*) situates the IPC within the law reform debates and colonial policy of the period; Greg Taylor's (at p.51, *post*) bemoans the lack of imitators of Macaulay's code, despite its value, and despite the fact that it was brought to the attention of those charged with codifying the law in New South Wales (in the 1860s-80s), Tasmania (in the 1920s), and Germany (the Prussian Code of 1851, and the North German Confederation's code of 1870). These articles will be of interest both to scholars of Commonwealth criminal law, and practitioners in the many jurisdictions still using a form of the IPC today.

As ever, the output of Commonwealth courts gives us another theme: joint criminal enterprise. This issue includes three case notes on the subject: on *Kho Jabing* (Singapore) (at p.174, *post*), on *Mzwempi* (South Africa) (at p.180, *post*), and on *Edmonds* (New Zealand) (at p.189, *post*). In combination with the case note we carried in our last issue on *Gnango* (England and Wales) (at [2011] J.C.C.L. 299), we trust that we have not only covered approaches on four continents, but have also given a good overview of the issues that arise. This is also an excellent example of how similar issues arise in cases from across the Commonwealth – it feels almost in waves – with similar difficulties. Lawyers in all jusrisdictions will benefit from greater understanding of the solutions found elsewhere to common problems.

Very much "on topic", Professor James Read, one of the editors of the excellent *Law Reports of the Commonwealth*, provides us with our opening article – an overview of major developments in criminal law across the Commonwealth, over the last decade. This throws into particularly clear light the common issues in the case law that practitioners, across jurisdictions, deal with every day.

We are also delighted to be able to include two pieces on topics relating to financial crime. Shannon Cuthbertson, as a long-standing adviser to the Commonwealth Attorney-General's department in Canberra, Australia, in her article (at p.69, *post*) gives an excellent first-hand account of the difficulties faced by common law jurisdictions seeking evidence from other jurisdictions, through mutual assistance, for use in criminal proceedings. This is ever more pertinent, with the rise of transnational crime and family matters. And from Hong Kong,

we have a case note on *Fu and Lee*, on expert evidence in the context of alleged market rigging and fraudulent trading (at p.165, *post*). Intriguingly, the judgment of the Final Court of Appeal in Hong Kong was delivered by the Hon. Murray Gleeson A.C., formerly Chief Justice of the High Court of Australia. As Peter Fitzgerald notes, this was particularly appropriate given that the relevant Hong Kong legislation was based on the corresponding Australian legislation.

In keeping with our interest in law reform, we include an excellent article from Mirko Bagaric and Theo Alexander on "the fallacy that is incapacitation" (at p.95, *post*) – an exciting and informative read for all who have an interest in sentencing.

This issue's jurisdiction spotlight, on South Africa (at p.125, *post*), comes from our own Jonathan Burchell – a titan of South African law – and two colleagues at the department of Public Law of the University of Cape Town – Kelly Phelps and Dee Smythe.

Our other case notes complete a broad issue, in style, content, and provenance, with pieces on the *Guardian News* case (England and Wales), on disclosure of court documents to the media (at p.157, *post*); *Aytugrul* (Australia), on DNA and how the expression of statistical evidence can make it more or less prejudicial than probative (at p.161, *post*); and *Barros* (Canada), on whether the defence can attempt to identify an informer (at p.170). These are all issues that will arise commonly in practice, in any jurisdiction.

I am ever grateful to the editorial board, for their work and counsel. Their combined experience is invaluable to a young journal like ours; their contributions to the content – whether by writing or reviewing it – are instrumental to the high quality which, I believe, we can rightly claim to stand for. Finally, I would like to pay a special tribute to Atli Stannard, who has not only contributed a case note, but has laboured heroically to bring this issue, as well as the first two issues, together. Most, if not all, of the contributors of articles to this issue have paid glowing tribute to the quality of his editorial work.

J.R.
June 25, 2012

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IN PURSUIT OF CRIMINAL JUSTICE: RECENT TRENDS IN COMMONWEALTH CASE-LAW

JAMES S. READ[*]

ABSTRACT

Recent cases reported in the Law Reports of the Commonwealth from many Commonwealth jurisdictions illustrate various recent trends in criminal justice. Human rights provisions, mainly in constitutional bills of rights, have impacted both on law and, more extensively, on all stages of criminal procedure, including police investigations and interrogation, and sentencing and punishment. In the context of sentencing and punishment, many Commonwealth constitutions expressly preserve the death penalty as a limitation of the right to life, but there has been a widely shared tendency to outlaw mandatory death sentences as forms of inhuman or degrading treatment or punishment, in denying judicial sentencing discretion. Led by the Judicial Committee of the Privy Council in deciding final appeals from Caribbean states, this reasoning has also been applied elsewhere, including Uganda and Kenya. However, the mandatory death sentence has been upheld, for different reasons, in Ghana and Singapore.

I. INTRODUCTION

The *Law Reports of the Commonwealth* ("LRCs"), now in their 28th year of publication, seek to provide a perspective on recent jurisprudence as reflected in selected judgments of courts throughout the Commonwealth. We aim to report judgments of special interest, likely to be helpful as precedents for citing in sister jurisdictions. Selection from the great number of judgments delivered on a daily basis throughout seventy or so Commonwealth jurisdictions (including dependencies) is challenging. Even with five substantial volumes a year, the emphasis is on judgments of final appeal courts, although most volumes also report some intermediate appeals and even first instance High Court decisions of special interest are not excluded; we have even reported one judgment from a magistrate's court which generated exceptional international interest.[1]

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[1] *Republic v. Soko* [2010] MWHC 2, [2010] 5 L.R.C. 807 (Malawi); see Part III.A., *post*.

The near universal heritage of the common law and its attendant judicial method throughout the Commonwealth provides a valuable link between jurisdictions, but other strong links exist in similar human rights guarantees, in codified criminal laws and in a widely shared legacy of statutes on various legal topics in common form and of particular significance in the areas of criminal law, procedure and evidence.

II. HUMAN RIGHTS AND THE CRIMINAL LAW

One of the most notable developments throughout the life of the series has been the steadily increasing impact of human rights principles on the conduct and outcome of criminal litigation. When the *Human Rights Act* 1998 enabled United Kingdom courts for the first time to apply the provisions of the *European Convention on Human Rights* 1950, it merely brought them into line with courts in other Commonwealth countries, almost all of which had long had justiciable human rights provisions, the majority in the form of bills of "Fundamental Rights and Freedoms" based on the European Convention and entrenched in the Constitutions and thus, as part of the supreme law of the state, endowing the courts with authority to rule inconsistent statute law invalid and void. In most cases such provisions ironically originated as a British initiative, a by-product of the decolonisation process of the 1960s, although India was the first new nation to adopt a Bill of Rights in its own modern Constitution in 1950, before the *European Convention* was signed, and the Bill of Rights in the *Constitution of the Kingdom of Tonga* dates from 1875. Another irony is that for over four decades the most senior British judges, as members of the Judicial Committee of the Privy Council, have interpreted and applied Convention rights as adopted in those Commonwealth countries which kept the Privy Council as their final court of appeal, as a number still do. The Canadian *Charter of Rights and Freedoms* 1982 also provides detailed protection of human rights but even more comprehensive provisions, extending protection to socio-economic rights, are those in the 1996 Constitution of the new South Africa. With all these provisions in force, Commonwealth judges still occasionally invoke earlier sources of human rights in English law, such as *Magna Carta* 1215 or the *Bill of Rights* 1689.

The impact of these provisions is reflected in the fact they have provided the largest single category of cases reported in the "LRCs". They have moulded the criminal law – as when the Constitutional Court of Uganda struck out offences of sedition from the Penal Code,[2] or the Delhi High Court held that the criminalisation of same-sex acts in private violated the Constitution.[3] To a much greater

[2] *Mwenda v. Att.-Gen.* [2010] UGCC 5, [2011] 1 L.R.C. 198.
[3] *Naz Foundation v. Delhi* [2009] INDLHC 2450, [2009] 4 L.R.C. 838.

extent, human rights principles have impacted on almost all stages of the criminal process, from investigation, arrest and interrogation to trial and sentencing.

III. CRIMINAL LAW

Nearly all Commonwealth countries share a common imperial legacy rejected by the United Kingdom itself: a codified criminal law. Yet the current Penal or Criminal Codes all trace their origins to one of the classic models based on English law and originally introduced under British authority. Lord Macaulay's *Indian Penal Code* of 1860[4] (drafted by 1838 and partly reflecting Scots law) has been in force for 152 years with little alteration; applies also in other jurisdictions, including Bangladesh, Pakistan, Sri Lanka, Malaysia, Singapore and Northern Nigeria; and, as will be seen, is still capable of springing surprises. James Stephens' *Draft Criminal Code* 1879, rejected by the Westminster Parliament, influenced codes adopted elsewhere, including Sir Samuel Griffith's *Queensland Criminal Code* of 1899, which was adopted in Southern Nigeria and in turn provided the source for the *Colonial Office Model Penal Code* of the 1930s, still in force in many African states and elsewhere. These old codes have served their nations well, requiring little significant amendment, and this shared background means that judgments on substantive criminal law are likely to be directly relevant to the interpretation of similar provisions in other jurisdictions.

A. The Impact of Human Rights on Criminal Law

Offences of sedition, and especially the "seditious intention" underlying them, are defined in similar terms in the codes of many Commonwealth countries, reproducing archaic provisions familiar in English law: "… an intention to bring into hatred or contempt or to excite disaffection against … the Government as by law established … the administration of justice …" etc. In 2010 the Constitutional Court of Uganda held that such vague terms gave the offences "an endless catchment area", infringing the right to freedom of speech and expression and freedom of the press and other media; as they had not been proved to be demonstrably justifiable in a free and democratic society – the constitutional test for validating limitations of that right – the court struck down the relevant sections of the Penal Code

[4] As to which, see two other articles in this issue: Barry Wright, "Macaulay's Indian Penal Code and Codification in the Nineteenth Century British Empire", *post*, 25; Greg Taylor, "Macaulay's IPC – A Success at Home, Overlooked Abroad", *post*, 51.

as unconstitutional, null and void.[5] However, in other jurisdictions similar offences of sedition continue to be charged and tried.[6]

Moreover, apparently similar laws may overlay widely divergent principles of popular morality. This has become most obvious in recent years as reflected in responses by the law and the courts to diversity of sexual orientation. Many Commonwealth codes preserve the criminalisation of consensual homosexual acts introduced into nineteenth century English law but repealed in England in 1967; however, in many jurisdictions such provisions are seldom enforced. The most significant judgment on equal rights in 2009 was delivered by the High Court at Delhi when it declared that section 377 of the *Indian Penal Code*, insofar as it criminalised consensual sexual acts between same-sex adults in private, violated the rights to equality and freedom from discrimination. The section was also held to violate the rights to privacy and dignity which, although not expressly protected by the Indian Constitution, had previously been held to be protected by the rights to liberty and freedom of expression and movement. In a judgment richly textured with comparative references, A.P. Shah C.J. noted a developing jurisprudence identifying a significant application of human rights law to people of diverse sexual orientations and gender identities, reflected at the international level in various treaties. He distinguished popular morality, based upon shifting and subjective notions of right and wrong, with constitutional morality reflected in the fundamental rights provisions as the conscience of the Constitution, which itself recognises, protects and celebrates diversity.[7]

The *Constitution of South Africa* expressly prohibits discrimination on the ground of sexual orientation and this has provoked several judgments by the Constitutional Court. However, elsewhere in Africa, popular morality supports a wholly different approach, demonstrated by a case in Malawi which attracted so much international attention, mainly unfavourable, that we exceptionally reported the judgment of a Chief Resident Magistrate. Two men who had openly conducted a traditional engagement ceremony, photos of which were admitted in evidence, were convicted of buggery or indecent practices; the accused did not give evidence at their trial but their caution statements and circumstantial evidence persuaded the magistrate that the burden of proof was satisfied. Despite a strong mitigation plea by defence counsel, the maximum sentence of 14 years' imprisonment was imposed for conduct which,

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5 *Mwenda v. Att.-Gen.* (n.2).

6 See, for example, *D.P.P. v. Billy* [2010] LSCA 13, [2010] 5 L.R.C. 390 (Lesotho).

7 *Naz Foundation v. Delhi* (n.3), [79]-[80]. For further comment and a full historical survey of the law see The Hon. Michael Kirby A.C., C.M.G., "The Sodomy Offence: England's Least Lovely Criminal Law Export?" [2011] J.C.C.L. 22-43.

the magistrate held, transgressed Malawian standards of propriety. Although nine days later, in response to international pressure, the men were pardoned by the late President Mutharika, he made it clear that he would not otherwise have done so, because they had offended Malawi's culture, religion and laws.[8] However, in May 2012, his successor, President Joyce Banda, announced her intention to repeal this law. This case was cited by Lord Hope, giving judgment in the United Kingdom Supreme Court allowing appeals by two practising homosexuals from Iran and Cameroon respectively against the refusal of their applications for asylum status:

> "Persecution for reasons of homosexuality was not perceived as a problem when the [Refugee] Convention was being drafted. … More recently, fanned by misguided but vigorous religious doctrine, the situation has changed dramatically. The ultra-conservative interpretation of Islam that prevails in Iran is one example. The rampant homophobic teaching that right-wing evangelical Christian churches indulge in throughout much of sub-Saharan Africa is another. The death penalty has just been proposed in Uganda for persons who engage in homosexual practices. … The fact is that a huge gulf has opened up in attitudes to and understanding of gay persons between societies on either side of the divide. It is one of the most demanding social issues of our time."[9]

The *International Convention to Suppress the Slave Trade and Slavery* 1926 seldom comes before the courts but had to be considered by the High Court of Australia as the source of a statutory definition of slavery, when restoring convictions of the owner of a licensed brothel for offences committed against five Thai "contract workers". The court was divided (Kirby J. dissenting) as to the mental element which it was necessary for the prosecution to prove. The majority held that, while intention was an essential element of the offence, it was not necessary for the prosecution to establish that the defendant had any knowledge or belief concerning the source of the powers exercised over the complainants. Kirby J. considered that, in the context of abhorrent contemporary instances of human trafficking, the majority approach was inconsistent with the need not to over-extend extremely serious slavery offences to apply to activities such as seriously oppressive employment relationships. He would have ordered a new trial, because it was essential for the fault element of intention to be

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8 *Republic v. Soko* (n.1).

9 *H.J. (Iran) v. Secretary of State for the Home Department* [2010] UKSC 31, [2011] 1 L.R.C. 463, [2]-[3].

applied to *all* and not just *some* of the ingredients of the offences, and this had not been explained accurately and clearly to the jury.[10]

B. Principles of criminal liability

The doctrine of common purpose defining the criminal liability of accessories is common to most Commonwealth jurisdictions but repeatedly claims the attention of appellate courts. The House of Lords restated that the liability of an accessory to murder is based on the accessory's subjective foresight of what his principal might do, not on foresight of the principal's intent:

> "To rule that an undisclosed and unforeseen intention to kill on the part of the primary offender may take a killing outside the scope of a common purpose to cause really serious injury, calling for a distinction irrelevant in the case of the primary offender, is in my view to subvert the rationale which underlies our law of murder."[11]

The High Court of Australia was divided in reviewing the doctrine of common purpose under the *Queensland Criminal Code* 1899: the ultimate question was whether the offence was "of such a nature as to be a probable consequence of the common purpose".[12]

Dismissing an appeal from Bermuda against a conviction of murder where the appellant was alleged to have aided the principal offender, the Privy Council considered the construction of the relevant provision in the *Criminal Code* defining secondary liability, finding no significant difference between that provision and the common law.[13]

In a recent judgment, the United Kingdom Supreme Court considered a particularly complex case of what has been called "crossfire killings". The defendant, Gnango, and a second man, never arrested, and known only as "Bandana Man" ("B"), had a dispute, allegedly about a sum of money. They met in a car park, possibly by arrangement. B shot at Gnango, who returned fire. B's bullet hit a third party in the head, killing her instantly. A question of general public importance was certified to the Supreme court, namely:

> "If D1 and D2 voluntarily engage in fighting each other, each intending to kill or cause grievous bodily harm to the other and each foreseeing that the other has the reciprocal intention, and if D1 mistakenly kills V in the course of the

10 *R. v. Tang* [2008] HCA 39, [2009] 2 L.R.C. 592.
11 *R. v. Rahman* [2008] UKHL 45, [2009] 2 L.R.C. 500, [25] (Lord Bingham).
12 *R. v. Keenan* [2009] HCA 1, [2009] 3 L.R.C. 538.
13 *Robinson v. R.* [2011] UKPC 3, [2011] 4 L.R.C. 231.

> fight, in what circumstances, if any, is D2 guilty of the offence of murdering V?"[14]

Restoring Gnango's conviction for murder, the Supreme Court was split in its decision. The approach that commanded the greatest support was that Gnango aided and abetted B to shoot at him by encouraging him to do so – led by Lord Phillips and Lord Judge,[15] with whom Lord Wilson and Lord Dyson agreed, if a little uncomfortably, in the latter's case.[16] This approach had, however, been rejected by the trial judge, and was not left to the jury. Lord Brown[17] and Lord Clarke[18] would have upheld the conviction on the basis that Gnango and B were joint principals in a joint enterprise to engage in unlawful violence designed to cause death or serious injury, where death resulted. The court rejected the "parasitic accessory liability" approach,[19] the basis on which the case was left by the judge to the jury and on which they had convicted: that Gnango and B participated in the commission of an affray, in the course of which B committed an offence (murder) which Gnango had foreseen he might commit. Lord Clarke[20] and Lord Dyson[21] also considered a fourth approach, not supported by the evidence: that Gnango caused B to shoot at him, and the victim's death was a foreseeable consequence of this reaction. Lord Kerr, in dissent, challenged each approach in turn. This decision has brought no clarity to this already complex field.

C. Homicide

Criminal code definitions of provocation as a defence to murder were recently reconsidered on final appeals in Canada and Australia. The Supreme Court of Canada examined the application of the subjective and objective elements of the defence and the requirement of suddenness in a case where the appellant had surprised his estranged wife in bed with another man, whom he killed: the situation did not amount to an insult at law, nor was there anything sudden about the discovery: it was the wife and the deceased who were surprised, not the appellant. The court observed that the objective element ensures

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14 *R. v. Gnango* [2011] UKSC 59, [2011] 1 W.L.R. 1414. For a fuller analysis of this case note, see Atli Stannard, "Securing a Conviction in 'Crossfire' Killings: Legal Precision *vs.* Policy" [2011] J.C.C.L. 299.

15 *Gnango* (n.14), [64].

16 *ibid.*, [103]-[104].

17 *ibid.*, [71].

18 *ibid.*, [81].

19 A term coined by Professor Sir John Smith Q.C.: *ibid.*, [15].

20 *ibid.*, [83]-[91].

21 *ibid.*, [106].

that the defence is informed by contemporary social norms and values, including changed views of the nature of marital relationships.[22]

The High Court of Australia held that provocation was not necessarily excluded as a defence where there was an interval between the provocative conduct and the accused's emotional response. Allowing the appeal and ordering a third retrial of the appellant, the court criticised some of the seven propositions outlined by the Court of Appeal when it quashed the first conviction.[23]

D. Sexual offences

The Canadian *Criminal Code* 1985 defines sexual assault as sexual touching without consent. In a recent case a woman consented to her erotic asphyxiation by her long-term partner and was unconscious when he inserted a dildo into her anus; vaginal intercourse occurred after she had regained consciousness. In these circumstances, had she consented to the relevant conduct? The appeal court quashed the conviction of her partner but on appeal by the Crown a divided Supreme Court by a majority restored the conviction, applying the principle of harmonious construction of the Act as a whole, which made it clear that, for consent to operate, the person had to be conscious throughout the sexual activity. Three judges in dissent held that the *Code*, protecting the right to say "No," did not restrict the right to say "Yes" to activity that neither involved bodily harm nor exceeded the bounds of consent freely given.[24]

E. Computer crime

A conviction of possessing child pornography on a computer was quashed by the Supreme Court of Canada: to obtain the search warrant which had led to the discovery of the incriminating computerised evidence the police had to provide reasonable and probable grounds, established on oath, to believe that an offence had been committed and on the facts the information supplied had been deficient: the police officer responsible had failed to make full and frank disclosure, the accused's rights had been infringed and the illegally obtained evidence should have been excluded as bringing the administration of justice into disrepute. It was difficult to imagine a more intrusive, extensive or invasive violation of privacy than the search of a personal computer. Furthermore, the *Criminal Code* 1985 provisions defining offences relating to child pornography criminalised

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22 *R. v. Tran*, 2010 SCC 58, [2011] 3 L.R.C. 437.

23 *Pollock v. R.* [2010] HCA 35, [2011] 3 L.R.C. 454.

24 *R. v. J.A.*, 2011 SCC 28, [2011] 5 L.R.C. 383. For a comprehensive note on this case see Linda Richardson, "Canada Says 'No' to Saying 'Yes' in Advance: The Unconscious Sexual Complainant" [2011] J.C.C.L. 309.

both the possession and the viewing of digital files, and the court distinguished between them: merely viewing in a web browser an image stored in a remote location on the internet did not establish the level of control necessary to establish possession: the object possessed had to have some sort of permanence.[25] The Supreme Court also examined the elements of another form of computer crime: luring a child, defined as communicating by computer with a person under 14 years of age for the purpose of facilitating, *inter alia*, the offence of invitation to sexual touching.[26]

The Supreme Court of Canada also considered the nature and scope of the defence to possession of child pornography in s.163 of the *Criminal Code* 1985, both before and after its amendment in 2005. In both incarnations, there was a defence related to artistic merit: before 2005, where the accused raised a reasonable doubt as to the material's artistic merit; after 2005, where the act alleged to constitute the offence has a legitimate purpose related to art, and does not pose undue risk of harm to underage persons. The defendant admitted possession of child pornography over a number of years, but claimed these were collected in preparation for an exhibition on child exploitation. Overturning both his acquittal, at trial, and the conviction substituted, erroneously, by the Ontario Court of Appeal, the Supreme Court held that the pre-2005 test engaged the artistic merit of the materials in question, not merely the intention of the person charged; and, in the post-2005 test, the "legitimate" purpose, its connection to the activities at issue, and the harm to children must be objectively ascertainable. The correct approach was to assess whether the physical or psychological harm to children is "objectively ascertainable" – to which end, expert opinion may be sought – and the degree of such harm that will be tolerated in respect of an objectively legitimate activity.[27]

F. A unique case

Even after 150 years, the venerable *Indian Penal Code* can still generate surprises, even for lawyers and judges. In Singapore, in 2004, an advocate and solicitor of 36 years' standing advised a client to bring civil proceedings claiming damages for loss incurred by the defendant's failure to complete an agreed purchase of a flat from the client. This advice was to have the unexpected result of provoking the prosecution of the advocate and his conviction of "abetting (by aiding) his client to dishonestly make a false claim in court", under section 209 of the *Penal Code*, a provision which was unprecedented in

25 *R. v. Morelli*, 2010 SCC 8, [2010] 5 L.R.C. 244.
26 *R. v. Legare*, 2009 SCC 56, [2010] 4 L.R.C. 26.
27 *R. v. Katigbak*, 2011 SCC 48, [2011] 3 S.C.R. 326.

English law. Not only had the section never been applied in a similar context in India but this was apparently the first known case in the Commonwealth in which a lawyer was convicted of such an offence. Upon conviction, the advocate was sentenced by the District Judge to three months' imprisonment, but on appeal the High Court, while upholding the conviction, reduced the sentence to one month's imprisonment plus a fine. With the Public Prosecutor's agreement, the advocate raised a number of important questions of law of public interest on a reference to the Court of Appeal. After intricate and scholarly analyses of the precise meanings of the key words "claim", "false" and even "court", and consideration of the relevance of the rules of civil procedure, the majority concluded that the conviction was not supported by the facts, as properly understood, and had to be quashed. V.K. Rajah J.A. excavated the origin of section 209 in the 1838 *Report of the Indian Law Commissioners*: the section "was clearly intended to deter the *abuse of court process* by all litigants who make false claims fraudulently, dishonestly or with intent to injure or annoy" but:

> "The primary objective of the provision appears to have been to deter the filing of [false] claims by the native population, whose morality was perceived by the English colonialists as being flawed."[28]

Such reasons would now be seen as anachronistic and even unacceptable, because of the patronising assumptions they made about Asian morality, perceived as being flawed. Not the least interesting aspect of the case was the fact, elicited by the court towards the end of the hearing, that, although the advocate had been convicted of abetting (by aiding) his client to make a false claim, the client himself had not been charged with the substantive offence.

IV. THE CRIMINAL PROCESS

A. Police investigations and interrogations

Criminal courts are routinely required to pass judgment upon the legality and effect of police investigations and interrogations. However, some recently reported cases demonstrate notable judicial reactions to investigation methods which understandably aroused particular concerns.

The Supreme Court of Canada examined the responsibility of Canada for the actions of officials who had visited a citizen detained – initially at the age of fifteen years, in 2002 – at Guantanamo Bay, interviewed him for intelligence and law enforcement purposes (knowing that he had been subjected to sleep deprivation) and shared the results of those interviews with United States officials.

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28 *Bachoo Mohan Singh v. Public Prosecutor* [2010] SGCA 25, [2011] 4 L.R.C. 329, [53], [55].

Upholding the decisions of courts below, the Supreme Court declared that, by active participation in an illegal regime contributing to the respondent's detention, Canada had violated the respondent's *Charter* rights to liberty and security, contrary to the principles of fundamental justice.[29]

The Supreme Court of India considered the implications, *inter alia*, for the right to liberty of the use of certain techniques of criminal investigation: the involuntary administration of polygraph (lie detector) examination, narcoanalysis and brain electrical activation profiles. Was such treatment compatible with personal liberty, any restriction of which had to be fair, non-arbitrary and reasonable? Despite vigorous argument for the state that these methods could be justified on the basis of compelling public interest in the prevention and detection of crime, the court held that the forcible subjection of any individual to such techniques was unconstitutional; while the voluntary administration of such techniques was permissible, subject to safeguards, the test results would be inadmissible in evidence for lack of conscious control by the subject over his responses. However, information or material discovered as a result of such voluntary tests would be admissible. The court directed strict adherence to guidelines published by the National Human Rights Commission for the conduct of polygraph tests and recommended the adoption of similar guidelines for the conduct of the other types of tests. The involuntary administration of such tests was also held to violate the fundamental right against self-incrimination.[30]

The Supreme Court of Canada considered the implications of the *Charter* right not to be "arbitrarily detained" in a case where a man was stopped in the street by police officers whose questioning led him to admit that he was carrying a firearm and some marijuana. Had he been "detained" before that admission and his subsequent arrest? Detention required a significant deprivation of liberty but could be under either physical or psychological constraint. The court held that the appellant had indeed been detained before making the admissions and went on to consider the impact of that finding on the question of the admissibility in evidence of the statements and of the gun.[31]

The Canadian *Charter* also protects the right to security against unreasonable search or seizure and provides that evidence obtained in violation of *Charter* rights must be excluded if, in all the circumstances, its admission would bring the administration of justice

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[29] *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 3 L.R.C. 668. For the Federal Court of Appeal judgment, see 2009 FCA 246, [2010] 1 L.R.C. 602.

[30] *Selvi v. State of Karnataka* [2010] INSC 340, [2010] 5 L.R.C. 137. See further Part V, *post*, on the right to freedom from self-incrimination.

[31] *R. v. Grant*, 2009 SCC 32, [2010] 1 L.R.C. 779. *Cf. R. v. Suberu*, 2009 SCC 33, [2010] 1 L.R.C. 844; and *R. v. Harrison*, 2009 SCC 33, [2010] 1 L.R.C. 864.

into disrepute. When a wife was tried on a charge of murdering her husband, the judge excluded evidence obtained after "police investigators over several hours had violated virtually every *Charter* right accorded to a suspect". The prosecution having no other evidence, the wife was acquitted. The Court of Appeal held that some of the evidence should have been admitted and ordered a new trial. The Supreme Court, by a majority, allowed the wife's appeal and restored the decision of the trial judge, who had not erred:

> "He took the only course open to him in order to prevent the administration of justice from falling into further disrepute by condoning this disturbing and aberrant police behaviour."

Deschamps J, dissenting, considered that it was the exclusion of the evidence that would bring the administration of justice into disrepute.[32]

In another Canadian case, nine masked police officers with loaded weapons drawn had forcibly entered a house which had only one, mentally challenged, occupant, the appellant's brother. Investigating officers, who had suspected that the house was used by a violent drug dealing gang, then found 99.4 grammes of cocaine, which the appellant admitted possessing for trafficking. The trial judge held that the search was lawful and refused to exclude the evidence resulting from it. The Supreme Court was again divided in dismissing the appellant's appeal against his conviction. The majority held that the search was not unreasonable, in the light of facts reasonably known to the police at the time, and therefore it was unnecessary to consider whether the evidence should have been excluded. Three judges in strong dissent held that the facts left no doubt that the appellant's right had been violated and his conviction should be quashed. They were particularly concerned that the entering officers did not have the search warrant - not a technical breach of the law but a violation of a venerable principle of historic and constitutional importance in avoiding violent resistance by those in the home. The minority were also critical of another aspect of the raid:

> "On the Crown's own evidence, the tactical team wore balaclavas *because that is what they always did*. And their avowed reason … was to intimidate and psychologically overpower those inside … Gratuitous intimidation of this sort – psychological violence entirely unrelated to the particular circumstances of the search – may in itself render a search unreasonable."[33]

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[32] *R. v. Côté*, 2011 SCC 46, [2011] 5 L.R.C. 682, [4], [118]. For a case note including discussion of this case, see Paul Kingsley Clark, "Exclusion of Evidence Obtained in Violation of Fundamental Rights in New Zealand & Canada" [2011] J.C.C.L. 345.

[33] *R. v. Cornell*, 2010 SCC 31, [2011] 1 L.R.C. 564 at [115]-[116].

On an important appeal from Jersey, the Privy Council considered the principles applicable to applications for a stay of criminal proceedings for abuse of process. The facts of the case resembled those of a fast-moving crime novel, involving the installation of tracking and audio recording devices in a suspect's car and boat, requiring consents of three foreign governments which were not all forthcoming, as part of a drug trafficking investigation. The outcome was the presentation in court of some unlawfully obtained evidence, making this, as Lord Brown recognised, a "fruit of the poison tree" case. The Board dismissed an appeal against the trial judge's refusal to stay the proceedings, but the police were not allowed to escape censure: the range of operational decisions the police may take does not include deliberate law-breaking at home or abroad; if the police take the law into their own hands they undermine the rule of law. The police should not take the outcome of the appeal as any kind of signal that they could repeat this kind of conduct with impunity and without the risk of subsequent proceedings being stayed for abuse of process.[34]

B. The right to counsel

Commonwealth courts understandably attach great importance to the right to counsel protected by the constitutions. The right to counsel during police interrogation is protected but the Canadian Supreme Court declined to transplant into Canadian jurisprudence the celebrated rule laid down by its United States counterpart in *Miranda v. Arizona*:[35] the right to counsel in the Canadian *Charter* did not demand the continued presence of counsel throughout a police interview process:

> "Adopting procedural protections from other jurisdictions in a piecemeal fashion risks upsetting the balance that has been struck by Canadian courts and legislatures."[36]

The Supreme Court also held that a detainee was entitled to a reasonable opportunity to contact a lawyer of his choice and to wait a reasonable time until he was available and that the police must inform detainees of these rights, so that they know that their right to counsel is not exhausted by unsuccessful attempts to contact a lawyer.[37]

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34 *Warren v. Att.-Gen.* [2011] UKPC 10, [2011] 3 L.R.C. 669. For a case note including discussion of this case, see Samantha Hatt, "Abuse of Process – A Trio of Commonwealth Cases" [2011] J.C.C.L. 333.

35 384 U.S. 436 (1966).

36 *R. v. Sinclair*, 2010 SCC 35, [2011] 1 L.R.C. 216.

37 *R. v. McCrimmon*, 2010 SCC 36, [2011] 1 L.R.C. 271; *R. v. Willier*, 2010 SCC 37, [2011] 1 L.R.C. 288.

In similar vein, the Supreme Court of India has held that the constitutional right of detainees to counsel must be given the widest possible construction. Furthermore, the right to liberty was violated when a defendant was unrepresented at his trial because an inaccurate cause list had failed to name his counsel. An accused should not suffer even if the lack of representation was due to his counsel's fault: the court should appoint another counsel to defend him.[38]

Commonwealth courts are also alert to maintain the proper standards of the legal profession. In India several local bar associations have adopted resolutions refusing to defend a certain person or persons – for example, alleged terrorists or even policemen (after clashes between police and advocates). The Supreme Court deplored such resolutions as wholly illegal and against all traditions and ethics of the bar, quoting the "immortal words" of Thomas Erskine in accepting the defence of Thomas Paine in 1792 as well as previous Indian precedents and celebrated American cases (including the fictional Atticus Finch).[39]

The Supreme Court of India recently had another occasion to define and affirm the proper role of advocates, while allowing appeals by a number of advocates who had apologised after being found guilty of criminal contempt and sentenced to imprisonment and fines for shouting slogans, abuse and threats against a magistrate in court:

> "…such flagrant violations of professional ethics and cultured conduct will only result in the ultimate destruction of a system without which no democracy can survive."[40]

C. Criminal trials

One fundamental element of English criminal procedure is absent from many Commonwealth jurisdictions: trial by jury. In the colonial period, it was not found practical or desirable to introduce jury trials in many colonies. The jury continues to be a key feature mainly in the original "dominions" of Australia, Canada and New Zealand, and in the Caribbean; in many other countries criminal trials are conducted by a judge "with the aid of assessors" or by a judge alone. Nevertheless, criminal appeals may still turn upon questions of misdirection, that is, whether, in the absence of a jury, the judge, in reaching his verdict, misdirected himself on a matter of law.

In jury trials, when the judge conducts a *voir dire* in the absence of the jury to determine whether alleged confessional statements by the

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38 *Sukur Ali v. State of Assam* [2011] INSC 195, [2011] 5 L.R.C. 73.

39 *Mohammed Rafi v. State of Tamil Nadu* [2010] INSC 1060, [2011] 4 L.R.C. 102, quoting from *Powell v. Alabama* 287 U.S. 45 (1932), *Re Anastaplo* 366 U.S. 82 (1961), and Harper Lee, *To Kill a Mocking Bird.*

40 *Sharma v. High Court of Punjab and Haryana* [2011] INSC 481, [2012] 1 L.R.C. 50, [24].

defendant were voluntarily made, the Privy Council has disapproved the former practice in Caribbean courts whereby the judge in summing up referred to his ruling on the *voir dire*, which may confuse the jury and amount to a material irregularity. In this connection, in 2011, the Board quashed a 1988 conviction of murder in 1984, and did not order a retrial, as the appellant had been in prison for 23 years, part of the time on death row.[41]

D. Retrials

The question of making an order for a retrial when a conviction is quashed on appeal recently divided the United Kingdom Supreme Court. The Court of Appeal quashed convictions of murder and robbery where a subsequent investigation revealed that police officers involved had conspired to pervert the course of justice, having systematically misled the court by withholding information, colluded in perjury by the main prosecution witness and perjured themselves. However, after his conviction, the defendant had made several voluntary admissions of his guilt, and the Court of Appeal, after identifying strong reasons why no retrial should be ordered, nevertheless ordered a retrial, against which order the defendant appealed to the Supreme Court.

The majority dismissed the appeal: the discretion of the Court of Appeal to order a retrial where "the interests of justice so require" called for an exercise of judgment which here involved a difficult balancing exercise and should only be upset on appeal if it was plainly wrong. In strong dissents, Lord Brown J.S.C. held that to obtain a conviction on retrial would mean that those responsible for corrupting the original process would be seen to have achieved their ends despite the enormity of the unpunished police misconduct involved: it was hard to imagine a worse case of sustained prosecutorial dishonesty. Lord Collins J.S.C. held that there should be no retrial on evidence which would not have been available but for a conviction obtained by conduct so fundamentally wrong that it would compromise the integrity of the criminal process to act upon it.[42]

V. CRIMINAL EVIDENCE

An encounter at a medical conference in Hong Kong resulted in the admission of hearsay expert medical evidence in the third week of a trial for sexual violation and murder in New Zealand. The child victim had HIV, to which the defence had attributed her death. It was a Crown medical witness who was allowed to testify at a late

41 *Krishna v. R.* [2011] UKPC 18, [2011] 5 L.R.C. 409 (P.C., Trinidad and Tobago).
42 *R. v. Maxwell* [2010] UKSC 48, [2012] 1 L.R.C. 688.

stage that a South African paediatrician had spoken of children whose deaths had resulted from congenital HIV. The accused was acquitted and, on a case stated on a question of law, the Court of Appeal held that, although the evidence should have been excluded, the judge's ruling was on facts and not susceptible to review. The Supreme Court held that the hearsay evidence failed to satisfy any of the relevant provisions of the *Evidence Act* 2006, which were binding on judges and gave them no discretion to admit evidence, and that the judge had therefore made an error of law; the court quashed the acquittals and ordered a new trial.[43]

An modern example of intra-Commonwealth borrowing was noted in the Eastern Caribbean Court of Appeal, in an appeal from St Lucia on identification evidence. The local *Evidence Act* 2002 was modelled on provisions of the Australian *Evidence Act* 1995, so that Australian decisions should prove helpful in interpreting the Act. The Act provides, as "a cardinal rule", that identification evidence is not admissible unless an identification parade has first been held or it was not reasonable to hold one. The court observed that, by enacting this rule, the Parliament had "frowned on the casual methods customarily employed by the police for detecting the identity of the perpetrators of crimes … that custom had now to be changed." The court quashed a conviction of robbery, ordering a new trial, where no reasons were given why no identification parade had been held but the accused had been identified in and out of court.[44] In other jurisdictions, English principles – as expressed, for example, in the *Turnbull* guidelines with regard to the treatment of identification evidence – may still be applied; in a recent appeal from Jamaica, the Privy Council stressed that those guidelines do not impose a fixed formula: it is sufficient if the judge's directions comply with the sense and spirit of the guidelines.[45]

The relevance of current United Kingdom law and practice in other Commonwealth jurisdictions was considered by the Privy Council in appeals from Caribbean courts concerning the admission in evidence of out-of-court statements made by a co-accused. The universal rule that admissions by a co-accused were generally inadmissible was modified by the House of Lords in 2005.[46] The Board rejected a submission that that decision had only persuasive authority in Trinidad and Tobago, holding that the considerations

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43 *R. v. Gwaze* [2010] NZSC 52, [2010] 5 L.R.C. 777.

44 *R. v. Hunte*, Crim. App. No. 12 of 2006 (ECSC, CA), [2011] 4 L.R.C. 450.

45 *Grieves v. R.* [2011] UKPC 39, [2012] 2 L.R.C. 238, applying *R. v. Turnbull* [1977] Q.B. 224. See also *Stewart v. R.* [2011] UKPC 39, [2012] 2 L.R.C. 313, another appeal to the Privy Council from Jamaica, on "dock identification".

46 *R. v. Hayter* [2005] UKHL 6, [2005] 1 W.L.R. 605.

underlying it applied equally there, although the facts of the case fell outside the modified principle.[47]

Does the common law recognise a spousal privilege against incrimination of a spouse? The High Court of Australia was recently divided on this question, the majority giving a negative answer and declining to extend the privilege against self-incrimination. Heydon J., dissenting, held that case law and legal texts recognised such a privilege as a rule of substantive law available not only in courts but before bodies like the Australian Crime Commission (the issue in the instant case).[48]

The Caribbean Court of Justice, on an appeal from Barbados, considered the application of the rules in the *Evidence Act* 1994 governing the grant of leave to a witness to refresh his memory from a document - in the case a police officer's notebook in which self-incriminatory statements by the accused had been recorded. The standard of proof of facts necessary to determine a question of admissibility of evidence was on the balance of probabilities, but the Act required a court to take account of the importance of the evidence in determining admissibility and, as a written statement by the accused was crucial to the prosecution case, there might not have been much difference in practice between establishing its voluntariness on that standard or on the standard of proof beyond reasonable doubt.[49]

VI. PUNISHMENTS AND SENTENCING

A. The death penalty

Many Commonwealth countries retain the death penalty for murder and other serious offences, requiring a specific constitutional exception to the right to life, although in many of them most condemned offenders are not executed. Where the death penalty is available, it was formerly normally mandatory. However, in India it has long been a discretionary sentence and the Supreme Court has established the principle that the death penalty is the exceptional sentence for murder, to be imposed only in the "rarest of the rare" cases, life imprisonment being the rule. The court recognises the "extraordinary burden" on a court, in imposing a death sentence, to carry out an objective assessment of the facts to satisfy the exceptions required by the "rarest of the rare" test, and the need for a fully-fledged bifurcated hearing and the recording of special reasons for the death sentence. Public opinion has no role to play in capital

47 *Persad v. State* [2007] UKPC 51, [2008] 2 L.R.C. 438.
48 *Australian Crime Commission v. Stoddart* [2011] HCA 47, [2012] 1 L.R.C. 487.
49 *R. v. Francis* [2009] CCJ 9 (AJ), [2010] 1 L.R.C. 571.

sentencing.[50] The court quashed death sentences imposed on two appellants convicted of killing five villagers whom they, armed and with others, had attempted to rob. The appellants had been in prison for 14 years and socio-economic factors – they came from an extremely poor background – provided mitigating circumstances: there was no reason why they could not be reformed.[51] However, the court upheld a death sentence imposed in another case where the appellant had been convicted of "particularly horrifying" murders of his wife and their five minor children.[52]

The Privy Council has developed a similar approach in restricting the imposition of the death penalty. In landmark decisions reflecting "the march of international jurisprudence"[53] the Board held that the mandatory death sentence for murder was an inhuman and degrading punishment outlawed by the constitutions, so that relevant criminal code provisions had to be read as providing only for discretionary sentences:

> "To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which section 7 [of the Constitution] exists to protect."[54]

However, the mandatory death penalty was saved by the constitutional protection of laws existing at the date of the Constitution, or re-enactments of existing laws, from challenge on human rights grounds in Barbados[55] and Trinidad and Tobago.[56] On a recent appeal from the latter country the Privy Council held that such protection did not save the mandatory death penalty in respect of murder committed in the course of an arrestable offence because that provision was not an "existing law", having been added by a statutory amendment after the previous felony-murder rule had been unintentionally repealed with the abolition of the category of felonies.[57]

In recent appeals the Board approved the restrictive approach adopted by judges in Caribbean courts: the death sentence should be

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50 *Santosh Kumar v. Maharashtra* [2009] INSC 1056, [2010] 1 L.R.C. 158.
51 *Mulla v. State of Uttar Pradesh* [2010] INSC 90, [2010] 4 L.R.C. 683.
52 *Jagdish v. State of Madhya Pradesh* [2009] INSC 1608, [2010] 3 L.R.C. 369.
53 *Watson v. R.* [2004] UKPC 34, [2004] 4 L.R.C. 811 (P.C., Jamaica), [30] (Lord Hope of Craighead).
54 *Reyes v. R.* [2002] UKPC 11, [2002] 2 L.R.C. 606 (P.C., Belize), [43] (Lord Bingham of Cornhill). See also *Watson* (n.53).
55 *Boyce v. R.* [2004] UKPC 32, [2004] 4 L.R.C. 749.
56 *Matthew v. State* [2004] UKPC 33, [2004] 4 L.R.C. 777.
57 *Miguel v. State* [2011] UKPC 14, [2012] 2 L.R.C. 320.

imposed only in the most extreme and exceptional cases - "the worst of the worst" or "rarest of the rare", there should be no reasonable prospect of the reform of the offender and the object of punishment should not be achievable by other means. A death sentence could not be justified by the local prevalence of murder, nor were the appellant's previous convictions a relevant factor to be taken into account. Furthermore, no judge should impose a death sentence without the benefit of psychiatric and social enquiry reports. In an appeal from St Vincent and the Grenadines, the Board quashed a death sentence because, although the appellant's behaviour had been appalling, it was not comparable to the worst cases of sadistic killings.[58] Quashing a death sentence imposed in Belize, the Board endorsed "the excellent guidelines" set out by Conteh C.J. in a previous case.[59] In quashing death sentences imposed in The Bahamas, the Privy Council recently reiterated that the conditions previously stipulated - that there had to be no reasonable prospect of reform of the offender and that the object of punishment could not be achieved by any other means - had to be satisfied and that a sentencing court would require professional advice on those matters.[60]

Nevertheless, there remains a wide disparity within the Commonwealth on the imposition of the death penalty. Opposite conclusions were reached in four recent cases in which the validity of mandatory death sentences was challenged. In Uganda, the Supreme Court held that statutory provisions imposing mandatory death sentences were inconsistent with constitutional provisions for the separation of powers, and therefore void, in denying courts the proper exercise of their sentencing powers and so compromising the right to fair trial. (The court noted, however, that for many years no death sentences had been carried out, leaving the condemned on death row ignorant of their fate.)[61]

In contrast, in Singapore the Court of Appeal affirmed the validity of the mandatory penalty, imposed for trafficking more than 15 grammes of diamorphine. The court distinguished the development of human rights jurisprudence in Privy Council decisions, interpreting constitutional prohibitions of inhuman punishment: there is no such prohibition in the Singapore Constitution. Furthermore, there was no rule of customary international law (which in any event would not

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58 *R. v. Trimmingham* [2009] UKPC 25, [2010] 1 L.R.C. 205.

59 *R. v. White* [2010] UKPC 22, [2011] 2 L.R.C. 208. The previous case referred to was *R. v. Reyes* [2003] 2 L.R.C. 688 (October 25, 2002, Supreme Court of Belize).

60 *Tido v. R.* [2011] UKPC 16, [2012] 2 L.R.C. 203, and *Lockhart v. R.* [2011] UKPC 33, [2012] 2 L.R.C. 216.

61 *Att.-Gen. v. Kigula* [2009] UGSC 6, [2009] 2 L.R.C. 168, 204.

prevail over domestic statute law) prohibiting the mandatory death penalty as an inhuman punishment.[62]

In Kenya the Court of Appeal found those same Privy Council decisions particularly persuasive and affirmed that the mandatory death penalty for murder was invalid, as the Attorney General had conceded, violating the constitutional protection against inhuman or degrading punishment and the right to fair trial. Meanwhile the President had commuted all death sentences, substituting life imprisonment, but the court remitted the appellant, who might well deserve the death penalty, for a sentencing hearing. The court observed:

> "It is an open secret that in Kenya, despite hundreds, possibly thousands, of serious crime offenders having been sent to the gallows by the courts since independence in 1963, only a handful of them have been executed, leaving the prisons inundated with a huge number of death row inmates."[63]

Again in contrast, in Ghana the Supreme Court by a majority upheld the validity of the mandatory death sentence. In protecting the right to life, the Constitution expressly excepts the execution of the sentence of a court following conviction. The majority held that the judiciary therefore had no business questioning the propriety of laws passed by Parliament unless they were inconsistent with the Constitution. Such inconsistency was precisely the basis of the vigorous dissent delivered by Date-Bah J.S.C., for whom the case for the unconstitutionality of the mandatory death sentence was unanswerable: stressing the universalist dimension of human rights, he found the soundness of the arguments adopted in persuasive authorities from other common law jurisdictions, including the Privy Council decisions, irrefutable and irresistible. In his view, not all murders had the same culpability and the mandatory death sentence therefore violated the constitutionally protected principle, immanent in the specific protection against cruel, inhuman or degrading treatment or punishment, that the punishment imposed should be proportionate to the gravity of the particular crime.[64]

There are contrasts too in neighbouring countries in southern Africa. In South Africa the death penalty was abolished in a celebrated early decision by the new Constitutional Court, as a cruel, inhuman and degrading punishment.[65] This decision was invoked in

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[62] *Yong Vui Kong v. Public Prosecutor* [2010] SGCA 20, [2011] 1 L.R.C. 642. The appellant also failed in a subsequent application for judicial review of the decision of the President, acting on the advice of the Cabinet, to refuse to grant him clemency: *Yong Vui Kong v. Att.-Gen.* [2011] SGHC 9, [2012] 2 L.R.C. 439.

[63] *Mutiso v. Republic* [2011] 1 L.R.C. 691 (February 29, 2008, Court of Appeal, Kenya), [14].

[64] *Johnson v. Republic* [2012] 1 L.R.C. 343 (March 16, 2011, Supreme Court, Ghana).

[65] *State v. Makwanyane* [1995] ZACC 3, [1995] 1 L.R.C. 269.

2011 when neighbouring Botswana sought the extradition of two of its citizens from South Africa on murder charges. The High Court granted them a declaration that their extradition would be unconstitutional unless the Botswana Government gave a written assurance that they would not under any circumstances face the death penalty; the authorities in Botswana had indicated that no such assurance would be given. The earlier Constitutional Court decision was intended to protect everyone to whom the South African Constitution applied, including protection from the imposition of the death penalty abroad. Failure to obtain the assurance required was an absolute bar to removal from South Africa, whether by way of extradition or by removal under immigration law. The court found support for its decision in Canadian jurisprudence, and was severely critical of the law and practice in Botswana, which, *inter alia*, was out of synchrony with the worldwide trend to abolish the death penalty and had an appalling history of "secret executions".[66] In Lesotho the death sentence for murder is discretionary if the court finds that there were extenuating circumstances, as in a recent case where the Court of Appeal identified such circumstances in the appellant's anger and frustration at the deceased's seriously provocative conduct over preceding years.[67]

B. Minimum sentences

Many Commonwealth Parliaments have responded to rising crime rates by introducing minimum sentences for offences seen as particular local problems, a practice which can be traced back at least to the 1960s. Courts have generally accepted such restrictions of their sentencing discretion, provided at least that the minimum sentences prescribed have not been disproportionate and especially if they preserve some space for judicial discretion in specified circumstances.

Thus, in Namibia, plagued by a scourge of stock theft prompting farmers to demand heavier sentences, Parliament in 1990 introduced a statutory minimum sentence, for a second or subsequent conviction, of three years' imprisonment, the validity of which was upheld by the courts.[68] Yet stock theft continued to increase and successive amendments raised the minimum sentence to twenty years' imprisonment on first conviction of theft of stock valued at $N500 or more, and thirty years upon a second or subsequent conviction; but a court could impose a lesser sentence if that was justified by substantial and compelling circumstances. When the legislation was

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66 *Tsebe v. Minister of Home Affairs* [2011] ZAGPJHC 115, [2012] 1 L.R.C. 747, citing, *inter alia*, *Canada (Minister of Justice) v. Burns*, 2001 SCC 7, [2001] 5 L.R.C. 19.

67 *Kopano v. R.* [2011] LSCA 19, [2012] 1 L.R.C. 1.

68 *State v. Vries* [1996] NAHC 53, [1997] 4 L.R.C. 1.

challenged as violating the constitutional prohibition of cruel, inhuman or degrading punishment, this provision was cited by the Prosecutor General as adequate protection for the fundamental right invoked. The High Court struck out the minimum sentences as unconstitutional: following South African jurisprudence, the court held that even a lesser sentence, where justified, would have to reflect the "benchmark" set by the statutory minima and if this resulted in a "shocking" or "disproportionate" sentence, so excessive that no reasonable man would have imposed it, the fundamental right would have been violated. The court also cited a decision of the Supreme Court of Canada requiring a sentencing scheme to exhibit proportionality to the seriousness of an offence, and a relevant gradation of punishments.[69]

The Constitutional Court of Seychelles dismissed a petition claiming, *inter alia*, that a statutory minimum sentencing regime for drug trafficking offences violated the constitutional protection: a sentence of ten years' imprisonment was not necessarily cruel, inhuman or degrading if it was proportionate to the seriousness of the offence.[70] The same court reached a similar conclusion in upholding a mandatory minimum sentence of five years' imprisonment imposed on a first offender convicted of breaking and entering.[71]

In Botswana minimum sentences of ten years' imprisonment are mandatory for certain offences but a lesser penalty may be imposed if "exceptional extenuating circumstances" render the minimum "totally inappropriate". The Court of Appeal has upheld minimum sentences passed on a 19-year-old convicted of defiling a girl aged under 16 and on a 20-year-old convicted of robbery: the appellants' youthfulness was not an exceptional extenuating circumstance, and would not be even for a juvenile offender.[72]

However, the Privy Council quashed as wholly disproportionate and inhuman or degrading punishment a sentence of three years' penal servitude imposed in Mauritius as a statutory minimum, later repealed, for possessing drugs as a trafficker and selling a single packet of cannabis. The Board also held that the delay of 11 years since the offence, which had violated the right to a fair hearing within a reasonable time, should be taken into account in the resentencing hearing, which was directed.[73]

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69 *Daniel v. Att.-Gen.* [2011] NAHC 66, [2011] 5 L.R.C. 258, citing, *inter alia*, *Dodo v. State* [2001] ZACC 16, [2001] 4 L.R.C. 318, *Centre for Child Law v. Minister of Justice* [2009] ZACC 18, [2009] 5 L.R.C. 745, and *R. v. Latimer*, 2001 SCC 1, [2001] 3 L.R.C. 593.

70 *Simeon v. Att.-Gen.* [2010] SCCC 3, [2011] 2 L.R.C. 411.

71 *Ponoo v. Att.-Gen.* [2010] SCCC 4, [2011] 3 L.R.C. 323.

72 *State v. Keboseke* [2008] BWCA 32, [2008] 5 L.R.C. 462.

73 *Aubeeluck v. State* [2010] UKPC 13, [2011] 1 L.R.C. 627.

C. Other sentencing decisions

The Supreme Court of Uganda found that statutes provided no definition of a sentence of life imprisonment which therefore had to be treated as extending to a whole natural life, subject to reduction for remissions. The court found Indian authorities to this effect persuasive, while noting that the meaning of such a sentence varies from one country to another.[74]

The Caribbean Court of Justice allowed an appeal against sentence from Barbados, where, unlike the United Kingdom and other jurisdictions, there is no statutory provision making it mandatory for a sentencing judge to give credit for time spent on remand before sentencing. The court therefore had to consider the scope of the judicial discretion at common law as to how to treat time spent on remand. The sentencing judge had discounted the sentence by two years, not the full four years and five months the appellant had spent in custody. Reducing the sentence accordingly, the court held that full credit should normally be given for time spent in custody, subject to a residual discretion not to do so in certain instances, some of which the court identified.[75]

The *Constitution of Tonga* 1875 does not prohibit cruel and unusual punishment, but the Court of Appeal recently quashed as excessive sentences of whipping (six lashes), the first in nearly 30 years, imposed on 17-year-old appellants for repeatedly escaping from custody. The court suggested, *obiter*, that the statutory provision for whipping was unconstitutional, noting that the prohibition of torture was part of customary international law, a *jus cogens* rule from which states cannot derogate.[76]

VI. CONCLUSION

The shared heritage of the common law links Commonwealth nations as strongly as does the English language, the other principal imperial legacy. Like English, the common law has developed local variations, and co-exists alongside local rivals, which include statute law, religious (mainly Islamic and Hindu) laws, and indigenous customary laws. However, it is in the field of criminal justice that the shared experience is most significant, clearly demonstrated in common approaches to fair trial procedures and in the sources of substantive law, found in the criminal codes which are almost universal throughout the Commonwealth and display their common descent from a small number of ancestors in nineteenth century

74 *Tigo Stephen v. Uganda* [2009] UGCA 6, [2012] 1 L.R.C. 679.
75 *R. v. da Costa Hall* [2011] CCJ 6 (AJ), [2011] 3 L.R.C. 731.
76 *Fangupo v. R.* [2010] TOCA 17, [2011] 1 L.R.C. 620.

England. Thus the Supreme Court of New Zealand recently had occasion to trace the evolution of provisions penalising the corruption of Members of Parliament from the *English Draft Code* 1879 and legislation of 1889, through the *Canadian Criminal Code* 1892 and subsequent measures.[77]

This selective summary of recent reported cases indicates the variety of judicial approaches across the Commonwealth to current issues of criminal justice, within this widely shared heritage of substantive and procedural laws. Constitutional frameworks, including human rights provisions, replicated in many jurisdictions, have a particular impact on criminal law and procedure. On some topics, recent judgments reflect the diversity which also exists between jurisdictions. The practice of citing judgments from sister jurisdictions, encouraged by many judges, is increasingly recognised, even when such precedents are not found to be persuasive: recent Privy Council and other judgments invalidating mandatory death sentences as inhuman or degrading were followed in Kenya and Uganda, but distinguished in Singapore and Ghana on the basis of the relevant constitutional provisions.

[77] *Field v. R.* [2011] NZSC 129, [2012] 2 L.R.C. 1.

MACAULAY'S INDIAN PENAL CODE AND CODIFICATION IN THE NINETEENTH CENTURY BRITISH EMPIRE

BARRY WRIGHT[*]

ABSTRACT

Thomas Macaulay's 1837 penal code for India, later the first criminal code enacted in the British Empire, is an ambitious and a still impressive example of lucid and comprehensive criminal legislation. It manifested many of the leading English law reform ideas of the early 19th century, reflecting Bentham's influence in particular. It tended to be dismissed by the bar and bench guardians of the common law later in the century and attempts to codify in England and Wales continue to be frustrated to this day. This article situates Macaulay's code within the law reform debates and colonial policy issues of the period. It briefly surveys its influence beyond India and its relationship to subsequent 19th century British criminal codes, including Robert Wright's Jamaica Code, Fitzjames Stephen's Draft English Code, and the Canadian, New Zealand and Queensland codes.

The Indian Penal Code (IPC), the first criminal code in the British Empire, has now been in effect for 150 years. Drafted by Thomas Macaulay in 1837 and enacted in 1860, it is an impressive example of comprehensive criminal law legislation, manifesting many of the most progressive law reform ideas of the period. English criminal law and its administration were transformed from the 1820s and 30s but criminal law codification was never realised, despite its central place in the law reform debates of the time. Criminal codes were developed in other British jurisdictions and Macaulay's pioneering effort was the basis for codes enacted in British colonies throughout South Asia. The IPC (along with the work of the English Criminal Law Commissioners, 1833-45) was a reference point for Robert Wright's draft Jamaica Code (1877), a model for codes enacted

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elsewhere in the West Indies and beyond. Fitzjames Stephen's Draft English Code, a cautious effort that reflected accommodation with the common law, was the closest England and Wales came to criminal law codification, despite more recent efforts, notably the Law Commission's work from 1968 to 2008. The 1880 bill died with the fall of the government, but Stephen's draft, rather than the IPC, became the main external reference for a wave of British self-governing jurisdiction codes at the end of the century – those of Canada (1892), New Zealand (1893) and Queensland (1899).

The IPC was not only the first of these codes but also came closest to a practical implementation of Jeremy Bentham's ideas about codification. And as Keith Smith observes, Macaulay's code, its antecedents and reception, are an important episode in the development of English criminal jurisprudence and 19th century intellectual history.[1] Many of the formative theoretical debates influencing common law reform originated in the work of William Blackstone and Jeremy Bentham. Blackstone's *Commentaries* celebrated and attempted to lend modern rational order to the common law. Bentham rejected that project, saw the common law as beyond the reach of rational reform, and coined the term "codification" to describe his radical break from it and ambitious reform agenda based on his "science" of legislation. All existing criminal laws were to be replaced by entirely new provisions set out in a rationally coherent and accessible form, anchored in the principles of utility, and amenable to efficient administration. Such a code held out the promise of a "universal" jurisprudence, applicable, as Bentham put it, to places as diverse as England and Bengal.[2] Inspired by these ideas, Macaulay drafted comprehensive criminal legislation that rationalised existing English doctrines, added progressive innovations, and eliminated common law elements. His code contained concise, coherent and accessible provisions designed to minimise judicial discretion, differences in legal status, and concession to local circumstances.

India had become a colonial laboratory for Bentham's ideas. Macaulay seized the opportunity provided by the reorganisation of its colonial government to assume the idealised utilitarian role of

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1 K.J.M. Smith, "Macaulay's Indian Penal Code: An Illustration of the Accidental Function of Time, Place and Personalities in Law Making", in W.M. Gordon, T.D. Fergus (eds), *Legal History in the Making* (Hambledon 1991), 145.

2 See "View of a complete code of laws", "On the influence of time and place in matters of legislation" and other writings throughout the Bowring edition of Bentham's *Works*: J. Bowring (ed.), *The Works Of Jeremy Bentham* (11 vols, originally published 1838-43, Russell & Russell 1962), vols 1, 3 and 10. See also J. Bentham, *An Introduction to the Principles of Morals and Legislation* (J.H. Burns and H.L.A. Hart eds, originally published 1789, Athlone 1970).

"enlightened despotic legislator." His sweeping law reforms there culminated with the drafting of the IPC. It was hoped that the colonial example would inspire codification in the metropole,[3] but rationalising reform had stalled beyond Robert Peel's Criminal Law Consolidations (1827-31). The bar and bench defenders of the common law portrayed codification as alien to English legal culture, a foreign innovation, an impractical notion cooked up by philosophical radical interlopers unversed in the law, appropriate perhaps for colonial backwaters but not the birthplace of the common law. Such chauvinistic dismissal, which has persisted, neglects the prominence of codification in nineteenth-century English criminal law reform debates.[4] It is also myopic, ignoring codes enacted in other British common law jurisdictions.

The IPC continues to impress as a technical law reform in the twenty-first century. It was a huge advance on existing English laws, and in some respects, English criminal law to this day.[5] This remains the case despite retrograde changes to the IPC from time of its belated enactment in 1860, which continued with later colonial amendments, adoptions elsewhere in British South Asia, and after independence.[6] Such positive legal assessment becomes more qualified if one embraces modern scepticism about persistent judicial tendencies and the limits of legislation. The ambitious legislative aims articulated by Bentham and Macaulay came out of a time of great optimism about the possibilities of comprehensive rational reform, an outlook that today would strike many critical legal scholars as somewhat simplistic.[7]

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3 A term used to indicate the United Kingdom, as the metropolitan centre of the British Empire – and even, on occasion, London.

4 On the centrality of codification to 19th century English reform debates, see K.J.M. Smith, Lawyers, Legislators and Theorists: Developments in English Criminal Jurisprudence, 1800-1957 (Clarendon 1998); K.J.M. Smith, James Fitzjames Stephen: Portrait of a Victorian Rationalist (Cambridge University Press 1988). See also M. Lobban, The Common Law and English Jurisprudence, 1760-1850 (Clarendon 1991); L. Farmer, "Reconstructing the English Codification Debate: The Criminal Law Commissioners, 1833-45" (2000) 18 Law and History Review 397.

5 See Smith's positive assessment (Smith, "Macaulay's Indian Penal Code" (n.1)), echoed by the editors and contributors in Wing-Cheong Chan, B. Wright, Stanley Yeo (eds), Codification, Macaulay and the Indian Penal Code: the Legacies and Modern Challenges of Reform (Ashgate 2011).

6 See n.69, *post*.

7 As the legal realists and others recognised in the 20th century, law makers have difficulty anticipating novel situations, and legislation is coloured by judicial application and the particularities of local circumstances. Experience shows that the systematic updating required for comprehensive codes is seldom a legislative priority, and amendments are usually *ad hoc* responses to political imperatives – and, routinely, achieved less openly, through judicial invention by way of constructions and inconsistent statutory interpretation. For examples of this, and continuing deference to English common law in modern IPC jurisdictions, see M. Sornorajah,

Macaulay's legacy is certainly rather more problematic for historians who are inclined to examine his reforms in a broader context. The IPC did not transcend his particular time, place and privileged position. Macaulay's premises were informed by his experience and values, his reference points were the English criminal laws he was familiar with, his reforms the product of a particular culture and an intellectual milieu of the European Enlightenment as translated into the agendas of British utilitarianism and liberalism. Nor was the IPC a disinterested initiative, utilitarian and liberal conceits aside. It was imposed by colonisers on the colonised and marked an important innovation in colonial policies and governance that reflected wider ambitions than merely the efficient administration of criminal justice. The reform sought to make British law more effective, and by extension engender compliance to British colonial rule, by making criminal law widely known and consistently administered in a diverse and challenging frontier setting. It also aimed to make British colonial rule more legitimate by minimising status differences and emphasising the rule of law. Challenges to British sovereignty and arbitrary responses to them caused increasing unease amongst the metropole's political classes concerned about the conformity of colonial rule to constitutional claims and the legal bases of British power.[8] The delayed enactment of the IPC was sparked by the 1857 insurrection or "the Mutiny", and similar crises helped to make codification a legislative priority in other British jurisdictions. Yet the IPC cannot be simply dismissed as essentially an exercise in power. It remains the groundbreaking criminal code, an impressive technical achievement with enduring qualities as a comprehensive and progressive law reform.

The following Parts unpack these themes by first elaborating on the criminal law reform context of Macaulay's project. The study then move on to survey the main features of his draft IPC. "Private defence," which replaced self defence and defence of property, has

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"The Interpretation of the Penal Codes" [1991] 3 The Malayan Law Journal cxxix. See also n.67, *post,* on the current challenges of codification.

[8] See, for example, E. Kolsky, "Codification and the Rule of Colonial Difference: Criminal Procedure in India" (2005) 23 Law and History Review 631, who calls (at 635) for further historical work on the relationship between Indian law reform and imperial political and policy challenges; and N. Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (University of Michigan Press 2003), who explores Fitzjames Stephen's telling *Minute on the Administration of Justice in British India* (quoted at 3-4): "[t]he establishment of a system of law which regulates the most important parts of the daily life of the people, constitutes in itself a moral conquest more striking, more durable, and far more solid, than the physical conquest which renders it possible." In the similar context of the 1860s Jamaica crisis, see R.W. Kostal, *A Jurisprudence of Power: Victorian Empire and the Rule of Law* (Oxford University Press 2005).

been selected for more detailed examination, as an illustration of Macaulay's many innovations. The article closes with a look at the reception of Macaulay's draft in India, England, and the broader British Empire.

I. THE ENGLISH CRIMINAL LAW REFORM CONTEXT

Inspired by Enlightenment, and motivated by the enticing possibility of approaching law as a science, Blackstone and Bentham sought to rationalise and systematise English law in taxonomies that inspired new legal forms and literature. A recent collection of essays on "the 19th century treatise" uses the metaphor of the common law as an old Gothic castle. Blackstone's project, a significant inspiration for modern treatise literature, aimed to renovate the castle. For Bentham the common law was beyond salvage and had to be replaced by comprehensive legislative reformulation of all laws. The castle was to be "knocked down" and replaced by a new Georgian villa with modern conveniences.[9]

Bentham's science of legislation and universal jurisprudence developed from his critique of William Blackstone's *Commentaries*. The break from his former teacher began with his 1776 *Fragment on Government*, and continued throughout his long life.[10] He acknowledged Blackstone's achievement in technical arrangement and lending rational order to English law.[11] But he concluded that

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[9] See A. Fernandez, M. Dubber (eds), *Law Books in Action: Essays on the Anglo-American Legal Treatise* (Hart 2012). My chapter, "Renovate or Rebuild? Treatises, Digests and Criminal Law Codification", in *ibid.*, 181, examines the relationship between modern law treatises and codes. Brian Simpson saw a direct connection, describing codification as the next logical step beyond the discursive treatise and possibly the most interesting development of the form (A.W.B. Simpson, "The Rise and Fall of the Legal Treatise: Legal Principles and the Forms of Legal Literature" (1981) 41 University of Chicago Law Review 632, 666). Morton Horwitz, referring to the U.S. experience, suggests modern treatises were a defensive response, a block to the threat codification posed to judicial power: Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (Oxford University Press 1992), 117-23. I suggest more complex patterns, intersections and tensions between these forms of legal literature, resolved according to professional priorities and defences of common law culture.

[10] See, for example, "A comment on the Commentaries" and "A fragment on Government", in Bentham (Burns, Hart eds) (n.2). Bentham's obsession with Blackstone continued for half a century (at age 80, he added 300 manuscript pages of critique): see W. Prest (ed.), Blackstone and His Commentaries: Biography, Law, History (Hart 2009), 63.

[11] "A Fragment on Government", in Bentham (Burns, Hart eds) (n.2). See also W. Blackstone, *Commentaries on the Laws of England* (originally published 1765-69, University of Chicago Press 1979). On the *Commentaries*, their significance in generating an understanding of the common law as a system, and as a formative intellectual influence on modern treatises, see Prest (n.10); S.F.C. Milsom, "The Nature of Blackstone's Achievement" (1981) 1 Oxford Journal of

the *Commentaries* were, in essence, as Smith puts it, an elegant palliative to the inherent chronic confusion of the common law.[12] The common law, Blackstone's preoccupation, was beyond the reach of rational reform, its arcane nature and needless complexities the invariable result of random cases and self-serving judges. Blackstone's defence of judicial power, based on the incredible claim that judges exercised little discretion around common-law rules, and his neglect and suspicion of legislation, were nonsense.[13] The common law should not be modernised, it should be eliminated.

Bentham's science of legislation, set out in *Introduction to the Principles of Morals and Legislation* and elsewhere, called for legislative reformulation of all laws, informed by the rational principles of utility, thought to have universal application. Unlike Blackstone's project, there would be no looking back, no reference to obscure archaic purposes, nor any attempt to marry traditional and modern objectives. His *pannomion*, composed of penal, constitutional and civil codes, aimed for nothing less than the comprehensive regulation of social relationships and sovereign power.[14] The criminal law occupied much of Bentham's attention, in contrast to its relatively minor place in the *Commentaries*, and its neglect in much of the later 19th century treatise literature (indeed, its portrayal as hardly counting as law at all in historical narratives celebrating the genius of the common law).[15] For Bentham, criminal law entails vital matters of public policy, liberty and individual happiness. It regulates key relations between the state and citizens, and is the most commonplace reflection of the exercise of state power in repressive forms, reflecting its monopoly over the legitimate use of violence. Punishment entails the deliberate infliction of harm. Such matters demanded clearer articulation and rational justification, and could not be entrusted to the courts.

Bentham's taxonomy of criminal harms, prohibitions and penalties took the rationalising spirit of the Enlightenment much further than Blackstone. He sought to map out and categorise all possible criminal acts and liability for them in provisions expressed so clearly

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Legal Studies 1; D. Kennedy, "The Structure of Blackstone's Commentaries" (1979) 28 Buffalo Law Review 205.

12 Smith, *Lawyers, Legislators and Theorists* (n.4), 11 (see also his discussion at 9-12); R. Cross, "Blackstone *v.* Bentham" (1976) 92 Law Quarterly Review 516.

13 See J.H. Langbein, "Blackstone on Judging" in Prest (ed.) (n.10), 65; John V. Orth, "Blackstone's Rules on the Construction of Statutes" in Prest (ed.) (n.10), 79; H.L.A. Hart, "The Demystification of Law" in Hart (ed.), Essays on Bentham: Jurisprudence and Political Theory (Clarendon 1982), 21.

14 See Smith, *Lawyers, Legislators and Theorists* (n.4), 20, 28-29; Farmer (n.4), 423.

15 See, for example, Milsom's dismissal: "Nothing worth-while was created… The criminal law became segregated as one of the dirty jobs of society." (S.F.C. Milsom, *Historical Foundations of the Common Law* (2nd edn, Butterworths 1981), 403.)

that an average person would understand them, and an average judge would be unable to claim not to do so. Yet Bentham never completed a working criminal code.[16] The transformations in the administration of English criminal law in the 1820s and 30s were influenced by complex factors, more a matter of reform consensus between leading Tories and Whigs than Bentham's advocacy.[17] Substantive criminal law reform, in the form of consolidation (collection and update of all statutes), digests (organised presentation of the law) and yet more comprehensive codifying rationalisations, was debated. Peel's Consolidations are relatively neglected by scholars, compared to the new police, the professionalisation of the criminal trial and the rise of the penitentiary. Yet they repealed or modernised hundreds of statutes, introduced new indictable and summary offence distinctions that led to the eventual demise of the old categories of felony and misdemeanour, and scaled back the death penalty from over 200 to a dozen offences, paving the way for the wide use of the penitentiary and the end of conditional pardons and transportation.

The fall of Wellington's government opened the door to the possibility of further criminal law reform under Henry Brougham. He was unable to match Peel's political and legislative skills; and Lord Chief Justice Ellenborough's defence of judicial powers had set the stage for more aggressive resistance to sweeping law reform.[18] Brougham's Criminal Law Commissioners, appointed in 1833 with a mandate to produce a digest of criminal statutes, another of common law, and to consider combining both, were divided over the scope of contemplated reform and were reduced to esoteric doctrinal and definitional debates.[19] A series of reports resulted in a combined

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[16] Outlines for codes and unfinished drafts are scattered though Bentham's unpublished work, and drafting offers went to law makers in America (Aaron Burr, President Madison and then most state governors), France, and Russia. Bentham's struggles with inductive and deductive logics, and between the universal and the particular, are explored in Lobban (n.4), 120-55.

[17] On Bentham's influence, see, for example, S.E. Finer, "The Transmission of Benthamite Ideas, 1826-1839", in G Sutherland (ed.), Studies in the Growth of Nineteenth Century Government (Routledge 1972); H. Benyon, "Mighty Bentham" (1981) 2 Journal of Legal History 62; R. McGowan, "The Image of Justice
and Reform of the Criminal Law in Early Nineteenth Century England" (1983) 32 Buffalo Law Review 89.

[18] James Mackintosh's 1819 committee that paved the way for Peel's consolidations did not involve close judicial consultation. This changed with subsequent legislative initiatives, and judges tended to be obstructive, often in defence of common law powers: see Smith, *Lawyers, Legislators and Theorists* (n.4), 56-63, 361, 364.

[19] John Austin, still Benthamite, quit in frustration in 1836. Andrew Amos left the Commission to succeed Macaulay in India, thought the IPC went too far, and returned. Henry Belleden Ker, active throughout, was primarily interested

digest in 1845, followed by more modest reports on indictable offences; but the 1853 bill, based on the latter, collapsed in the face of judicial criticism in a select committee. Few remnants of the commissioners' work are found in Charles Greaves's 1861 consolidation, an update of Peel's. Codification was not abandoned, but it proved more promising in colonial contexts.[20]

India became a utilitarian laboratory, where Macaulay went furthest of his generation of legislators to explore the possibilities of Bentham's theories of scientific legislation and universal jurisprudence. In 1832, the year he died, Bentham consulted closely with James Mill, drafted long letters to Governor-General Bentinck, and predicted he would be the "dead legislative of India."[21] But Macaulay's assumption of both the role and the very image of the utilitarian enlightened despotic legislator was surprising. He had not been part of the tight circle of Bentham and Mill disciples, and indeed published criticisms of their ideas in the *Edinburgh* and *Westminster Reviews,* noting that British experience favoured gradual, measured approaches. He warned of the potential threat utilitarian public policies and radical reform posed to British liberties, and expressed scepticism about their reductionist views of human nature. His background was in the "Clapham sect" (a privileged group of Anglican activists from South London committed to humanitarian reform), and he had spent the 1820s assisting his father Zachary's abolitionist work. After qualifying and briefly working as a barrister, he was elected to Parliament as a Whig MP and became a leading critic of the Tory oligarchy and an advocate of Parliamentary reform.[22]

Macaulay's contributions to the Whig victory and the passage of the *Reform Act* 1832 were rewarded with appointment as Secretary of the Government's Board of Control, which supervised British

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in technical legislative issues. See Farmer (n.4), 404-405; M. Lobban, "How Benthamatic Was the Criminal Law Commission?" (2000) 18 Law and History Review 427.

20 See Smith, *Lawyers, Legislators and Theorists* (n.4), 136-138; Smith, *Stephen* (n.4), 75-76. See the discussion in Part III and, in particular, at n.67, *post*.

21 Bentham's prescient comment about India appears in *Works* (n.2), vol. X

22 See J. Clive, Macaulay: the Shaping of the Historian (Harvard University Press 1987); Robert E. Sullivan, *Macaulay: The Tragedy of Power* (Harvard University Press 2009); Catherine Hall, "At Home with History: Macaulay and the *History of England*" in
C. Hall, S.O. Rose (eds), *At Home with the Empire: Metropolitan Culture and the Imperial World* (Cambridge University Press 2006), 32. He returned from India to appointment as Secretary of State for War and Colonies, a difficult portfolio in the aftermath of the Canadian rebellions and Lord Durham's report on colonial government reform. On the margins of the new Whig oligarchy, he retreated from politics to focus on history and literature (to become a leading representative of the "Whig theory of history": see H. Butterfield, *The Whig Interpretation of History* (originally published 1931, Bell 1950).

interests in India, and the East India Company. He became closely acquainted with James Mill as they worked on the reorganisation of India's colonial government, distracting him from leading other reform causes such as the imperial abolition of slavery.[23] Macaulay revealed his embrace of utilitarianism when he introduced the bill that became the *Indian Charter Act* 1833, declaring "[a code] is almost the only blessing – perhaps it is the only blessing which absolute governments are better fitted to confer on a nation than popular governments."[24] Such were the contradictions of 19th century British liberalism, more easily overlooked in an overseas setting, where the executive powers of the reconstituted colonial government gave Macaulay latitude to experiment with a radical law reform agenda impossible to contemplate at Westminster.

Arriving in India in 1835 as legal representative on the Governor-General of India's new Legislative Council, Macaulay wrote, "I have immense reforms in hand… such as would make old Bentham jump in his grave…"[25] His *Press Act* 1835 ended press licensing and censorship by prior restraint, the *Black Act* 1836 ended the special privileges of European residents in the civil courts, and his education reforms widened accessibility, modernised the curriculum and emphasised English language training with the aim of training a meritocratic Indian civil service. But the IPC, which he largely authored, was by far his biggest project. As he started, he wrote to Mill expressing the hope it would inspire codification at home, as Brougham's commissioners grappled with the continuing chaotic state of English law.[26]

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[23] The push for full abolition (the British slave trade ended in 1808 through the efforts of William Wilberforce, Zachary Macaulay and James Stephen) was tied up with the struggles against the Tory oligarchy and passage of the *Reform Act*. It was led by M.P. Thomas Buxton, supported by Macaulay (preoccupied with India bill, although he offered his resignation several times over lack of progress on abolition) and Brougham (preoccupied with setting up his Criminal Law Commission). Edward Stanley engineered the government's compromises with planter interests that accompanied the 1833 imperial abolition act, and James Stephen junior, father of Fitzjames, supervised the transition through the Colonial Office.

[24] HC Deb, July 10, 1833, 3rd series, vol. 19, col. 533. Clive (n.22), 467-73, argues that Macaulay embraced an impartial and enlightened utilitarian absolutism as a means to an end (eventual independence). The relationship between Bentham's political and legal theories, and their implication for matters such as democratic legislative power and imperialism, are much debated (see, for example, Jennifer Pitts, "Legislator of the World? A Rereading of Bentham on Colonies" (2003) 31 Political Theory 200, for recent challenges to Elie Helevy's influential portrayal of Bentham as a deeply authoritarian thinker).

[25] Macaulay to Thomas Flower Ellis, June 3, 1835, in Thomas Pinney (ed.), *The Selected Letters of Thomas Babington Macaulay* (Cambridge University Press 1982), vol. 3, "January 1834-August 1841", 146.

[26] Macaulay to Mill, August 24, 1835, quoted in Clive (n.22), 436-38.

II. OVERVIEW OF THE INDIAN PENAL CODE

Much of the commentary during Macaulay's time dismissed the IPC as the work of a philosophical radical non-lawyer. The more sympathetic assessments tended to downplay Bentham's influence, Stephen describing it as "…the criminal law of England freed from all technicalities and superfluities…"[27] – although he did acknowledge elsewhere, "[t]o compare the Indian penal code with English criminal law was like comparing *Cosmos* with *Chaos*."[28] Much more recently, Eric Stokes has illuminated Bentham's considerable influence.[29]

While the IPC became the most Benthamite code enacted, Bentham's precise impact remains difficult to determine. Giving form and practical content to Bentham's ideas, and making them work in the context of a specific time and place, proved difficult. There remained unresolved tensions between inductive and deductive logics, and between abstract principles and the situational – *i.e.* taking local particularities into account. Macaulay confronted the challenges with a Baconian pragmatism, aiming for the universal but accounting for time and place where necessary, and relying on a synthesis of existing English criminal laws rather than following Bentham's call to legislate entirely anew. He wrote a biography of Bacon during this time, which informed his approach to drafting challenges, and here he was probably inspired by Peel, who had quoted widely from Bacon to undercut opposition to his consolidation bills.[30]

A law commission headed by Macaulay was created by the India Legislative Council in May 1835, to examine a uniform system of law

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[27] J.F. Stephen, A History of the Criminal Law of England (Macmillan 1883), vol. 3, 300. See also S.G. Vesey-Fitzgerald, "Bentham and the Indian Codes", in G.W. Keeton, G. Schwarzenberger (eds), Jeremy Bentham and the Law: A Symposium (Stevens 1948), 222; M.C. Setalvad, The Common Law in India (Stevens 1960).

[28] Social Science Association, "Mr Fitzjames Stephen on Codification" (1872–73) 54 Law Times 44, 45.

[29] E. Stokes, The English Utilitarians and India (Oxford University Press 1959). For legal assessments after Stephen (n.27), see Vesey-Fitzgerald (n.27) and Setalvad (n.27). Smith's relatively recent and succinct overview (n.1) is difficult to improve upon. New assessments that include reference to the IPC from the perspective of rights, cultural heterogeneity and colonial rule debates, include Kolsky (n.8); Vasudha Dhagamwar, *Law, Power and Justice: The Protection of Personal Rights in the Indian Penal Code* (Sage 1992); and Radhika Singha, *A Despotism of Law: Crime and Justice in Early Colonial India* (Oxford University Press 1998).

[30] See Wright, "Renovate or Rebuild" (n.9). Smith, "Macaulay's Indian Penal Code" (n.1), 153, puts it similarly, referring to "a fusion of utilitarian clarity and rigour with Burkean pragmatism." Clive (n.22) examines the relationship between Macaulay's legislative drafting and historical and literary work (see also n.38, *post*). Bacon's ideas have more affinity with the case-by-case incremental development of general principles characteristic of the common law than the principled abstraction of Plato, or Cartesian identification of first principles and derived implications characteristic of the Roman-civilian legal tradition.

(envisaged by section 53 of the *Charter Act* and Mill's December 1834 despatch on its implementation); its mandate to codify the criminal law was approved the following month. A full draft, largely authored by Macaulay, was presented to Governor-General Auckland in May 1837 and formally submitted along with Commissioners' final report to council on 14 October 1837.[31] The main features of the code are surveyed here, along with a more detailed analysis of private defence.

Macaulay rejected mere consolidation, arguing for a comprehensive code to replace the existing patchwork of Muslim and Hindu laws overlaid with received English criminal laws and East Indian Company regulations, and for a singular standard of justice for all.[32] His Minute to Council of June 4, 1835, presented his commission's codifying principles:

- It should be more than a mere digest of existing laws, but cover all contingencies, and nothing that is not in the code ought to be law.
- Crime should be suppressed with the least infliction of suffering, and allow for the ascertaining of truth at minimal cost of time and money.
- Its language should be clear, unequivocal and concise. Every criminal act should be separately defined, the language followed in indictment, and conduct found to fall within it.
- Uniformity is the chief end; special definitions, procedures or other exceptions to account for different races or sects should not be included without clear and strong reasons.[33]

These codifying principles of comprehensiveness, accessibility and consistency are a practical rendition of Bentham's legislative aspirations – and indeed, Macaulay's presentation of law in the resulting draft was a radical break from existing English forms.

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[31] See "Copy of the Penal Code Prepared by the Indian Law Commissioners and published by Command of the Governor-General of India in Council" (paper no. 673, Return of the House of Commons, July 30, 1838), in *British Parliamentary Papers* (*BPP*), vol. 41, 1837-80, 463-587. Macaulay's fellow commissioners succumbed to the heat and illness, although John Macleod did much to keep the draft in official view after Macaulay's return from India. He testified in 1848, "I may state a fact already generally known when I say that Mr Macaulay is justly entitled to be called the author of the Indian Penal Code": Macleod, *Notes on the Report of the Indian Law Commissioners on the Indian Penal Code* (Clowes 1848), vi.

[32] Applicable criminal laws included Muslim (Bengal, Madras and other parts of the north, east and south) and Hindu laws (Bombay), overlaid with East India Company regulations, while European residents were governed by received English laws, on the basis of the *Regulating Act* 1773 – which established a Supreme Court in Calcutta and confirmed that English criminal law in effect in 1726 was binding on all Calcutta residents and European residents throughout India – as amended in 1828 with the adoption of Peel's first consolidations.

[33] These are paraphrased: see Chan, Wright, Yeo (eds) (n.5), 22-23.

The substantive doctrines are less so. The provisions are accompanied by *Examples* illustrating their application to hypothetical cases. Explanatory "Notes" criticise existing English laws and discuss the conceptual features of key provisions. Macaulay's debt to Bentham is more discernible in conception (drafting principles), form and presentation than in doctrinal details. The latter derive from existing laws, modernised but not reinvented as had been suggested by Bentham's call to legislate anew.

A. A survey of the IPC's provisions

The IPC presents a comprehensive statement of criminal law that, as Fitzjames Stephen put it, "…was the first specimen of an entirely new and original method of legislative expression …"[34] Macaulay fully embraced Bentham's extension of the logic of classification in the natural sciences to law, attempting a full taxonomy that precluded the common law and aimed for a systematic and exhaustive statement of criminal harms and attendant prohibitions, liability standards, and penalties (maximums), expressed precisely and consistently. Following Bentham's principles of "nomography", Macaulay devised concise, direct legal expression, characterised by simplicity, clarity, economy and lack of technicality, within a rationally organised and self-contained legislative whole.[35]

Macaulay's illustrative *Examples* were designed to exhibit a provision's entire meaning and range of application. They aimed to minimise the possibilities of judicial discretion, serving in effect as authoritative precedents set by legislators rather than judges. Bentham contemplated the device,[36] but the technique was rejected by the Brougham's Commissioners in 1839 and in Wright's Jamaica draft.[37] Examples were generated out of subjecting draft definitions to hypothetical exceptions; if doubts or uncertainties were raised, they were accommodated in revisions to sharpen expression, logical distinctions, comprehensibility and perspicuity.[38]

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34 Stephen, *History* (n.27), vol. 3, 302-303.

35 Stokes (n.29), 230. See also Smith, "Macaulay's Indian Penal Code" (n.1), 153-58.

36 See Stokes, (n.29), 230.

37 On the basis that complete expression of a provision rendered illustration unnecessary: see Smith, *Lawyers, Legislators and Theorists* (n.4), 151-52

38 See Clive (n.22), 461-62, who notes that this process honed Macaulay's expressive skills, drawing parallels between the challenges faced by legislators and historians of capturing both the particular and the general. Macaulay's method here is analogous to the approach to synthesis in the modern treatise, although the objective is prescriptive rather than descriptive, and his approach results in more economical expression of the law than the more typical unwieldy treatise formulations: see Wright, "Renovate or Rebuild?" (n.9), 191.

Macaulay's "Notes", which disappeared from the enacted version of the IPC, may be seen as a succinct critical treatise on English criminal law in the 1830s.[39] Key concepts are explained, but incisive critique of existing English laws dominates the text, Macaulay taking obvious delight in pointing out common-law absurdities. But the basic doctrines build from a background he knew best: English common law and Peel's consolidations, peppered with occasional explicit reference to the 1810 French penal code and the 1826 draft Louisiana code.[40] The combination of critique and concise explanation reflects Macaulay's historical sensibilities and skills at theoretical and technical synthesis, but Stokes observes that the separate appearance of the rationales for the laws was a departure from Bentham's legislative method.[41] It is a revealing departure, suggesting the significant place of existing laws as Macaulay's starting point and primary reference.

The substantive provisions are a departure from Bentham's radical injunction to reformulate and legislate the criminal law entirely anew, and from the principles of utility. As the "Notes" suggest, they derived mostly from what Macaulay was familiar with – English laws reworked, simplified and modernised according to more general liberal sensibilities. Most are progressive for the time; indeed, a number of them are more advanced than current criminal laws in many common-law jurisdictions. Offences are accompanied at times by specific exceptions (Macaulay preferred this term to defences) applicable to individual clauses or a limited class of provisions, while Chapter III contains General Exceptions applicable to all the penal clauses in the code. Principles of liability are not defined in a general part (Chapter I is concerned with definitions), but there is sustained attention to fault requirements and use of consistent terms, with

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39 Wright, "Renovate or Rebuild?" (n.9), 192.

40 The "Notes" do not make precise attributions; there are oblique references to Peel, more to Bentham, and about a dozen to the French and Louisiana codes. The 1810 French code derived from the revolutionary 1791 codification, inflected with utilitarianism by Jean-Etienne-Marie Portalis. Bentham and Portalis influenced Edward Livingston's Louisiana draft penal code (which made some use of examples). Early codification in the U.S.A. reflected attempts to curb judicial power and extend the Revolution into the legal sphere by forcing a decisive break from the continuing influence of the English legal tradition. Less radical later 19th century codification efforts were led by David Dudley Fields: see Horwitz (n.9); C.M. Cook, The American Codification Movement: A Study of Antebellum Legal Reform (Greenwood 1981);
Sanford Kadish, "Codifiers of the Criminal Law: Wechsler's Predecessors" (1978) 78 Columbia Law Review 1098. American codes appear to have had little influence on British jurisdictions – although, interestingly, they received more attention in Queensland and New Zealand than in Canada.

41 Stokes (n.29), 229-30, notes that Livingston, following Bentham, had attempted to weave rationales into provisions with unwieldy results.

emphasis on subjective standards (intent), and occasional use of lesser standards of rashness (the Macaulayan term for knowledge and reckless disregard) for endangering offences and negligence, where public duties are specified. The IPC as originally drafted rejected the English doctrines of constructive liability and attempts to infer mental state from the act, including the notion of malice aforethought. Abetment is found in Chapter IV.[42]

The arcane English laws of murder and theft are thoroughly reconstituted (see Chapter XVIII, offences affecting the human body, and Chapter XIX, offences against property). Political offences (Chapter V) reflect a libertarian orientation, as manifested in Macaulay's narrow definition of treason, and effective abolition of seditious libel (by way of Chapters XVII and XXV, provisions on the press and defamation – although inciting disaffection remains an offence). He develops new forms of criminal liability for abuse of state and official powers, matters largely left to parliamentary privilege or unaddressed in English criminal law (Chapters VIII and IX). There are also modern extensions of liability for endangering and intangible harms (Chapter XIV). The replacement of the common law offence of blasphemy with something more pluralistic that reflects India's complexities (Chapter XV) anticipates modern measures against cultural denigration. Macaulay noted, "[t]here is perhaps no country in which the Government has so much to apprehend from religious excitement among the people."[43]

Macaulay's Clapham sect values are more apparent in his doctrines concerning the exploitation of vulnerable groups such as women, children and labourers. There were no exceptions from liability based on any rights of men or masters, and the wrongful restraint provisions (Chapter XVIII) were robust. Matters of consent and sexual offences reflect the Victorian assumptions of Macaulay's time, but were nonetheless generally an advance on existing English laws.[44]

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[42] See the detailed discussion of matters of culpability in the IPC in the chapters by Neil Morgan, Bob Sullivan, Kumaralingam Amirathalingam, Wing-Cheong Chan and Michael Hor in Chan, Wright, Yeo (eds) (n.5). See also Smith, "Macaulay's Indian Penal Code" (n.1), 158-60. For defences, see n.46, *post*.

[43] "Note J", *BPP* (n.31).

[44] For a critical view of the shortcomings of these provisions, see Dhagamwar (n.29). The treatment of homosexuality illustrates the diverse directions the IPC has developed. In India, Macaulay's original criminalisation has recently been repealed (*Naz Foundation v. Delhi* [2009] INDLHC 2450, [2009] 4 L.R.C. 838, whereas in many other IPC jurisdictions the sanctions have been increased. On the legacy of British colonial anti-homosexual legislation, see Michael Kirby, "The Sodomy Offence: England's Least Lovely Criminal Law Export?" [2011] J.C.C.L. 22. On consent, see S. Yeo, "Constructing Consent under the Penal Code", in D. Neo, H.W. Tang, M. Hor (eds), *Lives in the Law* (National University of Singapore Faculty of Law and Academy Publishing 2007), 179.

Macaulay's scheme of punishment (Chapter II) reflected a combination of Clapham sect humanitarianism as well as the utilitarian logic of deterrence, emphasizing certainty and proportionality. Capital punishment is limited to two offences (treason narrowly defined, and premeditated murder – Peel's dramatic reduction was from over 200 to a dozen offences) and corporal punishment is abolished.[45]

B. Private Defence

One of the striking doctrinal innovations in the IPC is Macaulay's "private defence." The other general exceptions in Chapter III are more familiar and relate to various matters of incapacity, offences committed under a perceived legal obligation and consent. In reconstituting self defence and defence of property, Macaulay's "Note B" observes:

> "We propose (clauses 74 to 84) to except from the operation of the penal clauses of the code large classes of acts done in good faith for the purpose of repelling unlawful aggressions. In this part of the chapter we have attempted to define, with as much exactness as the subject appears to us to admit, the limits of the right of private defence. It may be that we have allowed too great a latitude to the exercise of this right…In this country the danger is on the other side; the people are too little disposed to help themselves…Under these circumstances we are desirous rather to rouse and encourage a manly spirit among the people than to multiply restrictions…We think it right, however, to say that there is no part of the code with which we feel less satisfied than this."[46]

Macaulay's doctrinal rationalisation attempts a balance between deference to authority and self-help, and is one of the innovations that transparently reflects colonial policy considerations and British perceptions of Indian circumstances. His aim of encouraging the development of the ideal attributes for British subjects (formation of values and identity) reveals the broader public order objectives of codification noted in the introduction to this article.

As Cheah Wui Ling observes, the design of private defence had little to do with a rights-based conception of self-defence (right to life or bodily integrity). Yet this modern common law approach to self-defence has been taken up by most courts and commentators in IPC

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45 "Note A", *BPP* (n.31).

46 "Note B", *BPP* (n.31). The entire note is a good illustration of Macaulay's legal synthesis and literary breadth. This section borrows heavily from Cheah Wui Ling, "Private Defence", in Chan, Wright, Yeo (eds) (n.5), 185. (Stanley Yeo's chapter examines Macaulay's reluctance to recognise the defences of duress and necessity, Ian Leader-Elliott's chapter reviews provocation and briefly looks at "sudden fight," and Gerry Ferguson's chapters deal with insanity and intoxication).

jurisdictions with little regard to the code provisions.[47] Macaulay's approach is best understood as an expression of British colonial ruling interests in crime prevention (and a perceived prevalence of lawlessness in India) and character formation (given the purported tendency of Indian populations to passivity and to toleration of lawlessness).[48] This involved what Macaulay saw as a difficult, and perhaps not entirely satisfactory, balance between encouraging compliance with public authority and the promotion of a "manly" defence of private interests. In other words, his concern was sovereignty not rights. To what extent are individuals conceded an exception to the state's monopoly over the legitimate use of force, and to what extent may it be demanded they defer to this monopoly? Macaulay's resolution of this difficult issue entailed a projection of British or Eurocentric conceptions of public and private interests, explicitly encompassing private property as a primary value, and implicitly envisaging a particular gendered and cultural construction of the British subject as self-reliant but law-abiding.

Macaulay's draft provisions, which were not significantly altered when the IPC was enacted,[49] sets out a right (section 74) to defend one's body and the body of others against every assault, as well as one's property and the property of others against every act or attempt which falls under the definition of theft, robbery, mischief or criminal trespass as set out in the code.[50] The following clause (section 75) sets out restrictions: there is no right of private defence against acts of public servants who are legally competent to commit them, or in cases in which there is time to have recourse to the protection of public authorities.

Section 75 refers to proportionality of response, stating that the right of private defence in no case extends to the inflicting of more harm than is necessary for the purpose of the defence. Later sections refer to imminence of the threat: section 78 states that right of private defence of the body commences as soon as the danger to the body commences, though no assault may yet have been committed, and continues as long as that danger continues. Section 81 states that the right to private defence of property commences when the danger to property commences, and continues, in the case

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[47] See, for example, A.J. Ashworth, "Self Defence and the Right to Life" (1975) 34 Cambridge Law Journal 282; F. Leverick, *Killing in Self Defence* (Oxford University Press 2006); B. Sangero, *Self-Defence in Criminal Law* (Hart 2006).

[48] Cheah (n.46), 188-89.

[49] See Cheah, *ibid.*, for the relatively minor changes made to the wording, numbering and organisation of private defence in enacted versions.

[50] Section 82 notes that the same right to private defence applies to acts which would otherwise be offences if not for one of the recognised incapacities of the person doing the act.

of theft or robbery, until the offender has retreated from property or it had been recovered, and in other cases as long as criminal trespass and mischief continues, and housebreaking continues as trespass.

Limits are set out for the resort to deadly defensive force. When defending one's body such force may be applied if the offence defended against is an assault "as may reasonably cause the apprehension that death will otherwise be the consequence of such assault," or reasonably causes apprehension of "grievous hurt" or the intention of committing rape, "gratifying unnatural lust," kidnapping or abducting, or more serious situations of wrongful confinement (section 76). Deadly defensive force may also be used in defence of property (section 79) in response to a robbery, "house-breaking by night," "mischief by fire" committed on any building, tent or vessel used as a human dwelling, or in more minor cases of "…theft, mischief or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt would otherwise be consequence…"[51]

Colonial policy, identity, and public order considerations informed Macaulay's original conception of the defence, and the provisions themselves have remained largely unchanged. Yet their content has been reshaped by judicial interpretation, with resulting inconsistencies, as Cheah argues, rather than a coherent re-conceptualisation that engages directly with a modern approach to the defence. Non-IPC common law jurisdiction decisions (which themselves are inconsistent) are relied on more often than those of other IPC jurisdictions for modern guidance on key issues such as reasonableness, imminence of threats, and proportionality of force.[52] This jurisprudence is appended to provisions that were designed in a particular colonial context, despite Macaulay's broader Benthamite aspirations of universal jurisprudence. The provisions themselves do not allow for sustained consideration of individual rights, whether reasonableness adequately assesses contextual factors, and the relative proportionality of harms (*e.g.* whether defence of property warrants the infliction of death).[53] Thus Macaulay's innovation cannot be assessed as a progressive one on these modern grounds – then again, he was not entirely satisfied with

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51 Section 80.

52 See Cheah (n.46), 193-200; and, generally, Sornorajah (n.7). Self defence is arguably related to necessity (which in Canada remains a common law defence), although distinct in that the violent response is to unlawful force, and specific rules have developed around the nature of the threats and responses to them. (Self defence in Canada is set out in the *Criminal Code* 1985, ss.34-37, although common law developments continue to influence approaches to those provisions – *e.g. R. v. Pétel* [1994] 1 SCR 3 (Supreme Court of Canada).)

53 See Cheah, (n.46). She reviews judicial developments in India, Malaysia and Singapore, and goes on to suggest how private defence could be reformulated to more satisfactorily encompass a modern, rights-based approach.

the draft. The current state of private defence clearly reflects the consequences of the lack of systematic legislative attention needed to maintain comprehensive codes, as well as the intrusion of common law and effects of judicial constructions that Macaulay sought to minimise.[54]

III. RECEPTION OF MACAULAY'S IPC AND LATER 19TH CENTURY BRITISH CODES

This Part returns briefly to the more immediate historical legacy of Macaulay's IPC in India and in the wider 19th century British Empire. In India, the 1837 draft encountered what Smith describes as "the great dead weight power of governmental and administrative inertia"[55] The immediate reception of Macaulay's draft by his successor Andrew Amos and Governor-General Auckland to the later events that resulted in its enactment in 1860 have been detailed elsewhere[56] (e.g. the endorsements of the 1846-8 Indian Law Commissioners, the selection of Macaulay's draft over a rival proposal from Drinkwater Bethune by the 1852 Select Committee of the House of Lords, and the final India Law Commission revisions and recommendations led by Barnes Peacock). In brief, many of the subsequent legal appointees to the India Legislative Council (from Amos through to Henry Maine) tended to criticise or dismiss the code, and Macaulay's effort was denigrated by the bar and bench in both metropole and colony. On the colonial policy front, utilitarian reform agendas were compromised by the persistence of orientalism, by pressing military and commercial pressures in India, and even by missionaries incensed by Macaulay's replacement of blasphemy with provisions that revealed him as "churchwarden to the idol." And European residents in India objected to Macaulay's dismantling of legal privileges and the code's emphasis on equal legal status under the criminal law, a conflict that persisted for decades and culminated in the *Ilbert Bill* controversy in 1883.[57]

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54 See S. Yeo, B. Wright, "Revitalising Macaulay's India Penal Code", in Chan, Wright, Yeo (eds) (n.5), 7; and Sornorajah (n.7), who is particularly critical of the persistence of colonial attitudes among judges in IPC jurisdictions and their reliance on English, and to a lesser extent Australian and Canadian, high court decisions.

55 Smith, "Macaulay's Indian Penal Code" (n.1), 160; see also, Smith, *Stephen* (n.4), 126-31.

56 Amos was critical of Macaulay's divergences from the work of Brougham's English Law Commissioners, ignored the remnants of Macaulay's law commission, and was preoccupied with maintaining direct influence on Council. Auckland wrote to Hobhouse in the summer of 1838, detailing objections from the bar and bench in Madras and from missionaries, who drafted a memorial about potential obstacles to their religious work. Auckland delayed wider circulation of the IPC to judicial and administrative branches until late 1839. For subsequent details on the fate of the draft to enactment, see Stephen, *History* (n.27), vol. 3, 299-300; Stokes (n.29), 262; Dhagamwar (n.29), 77-85.

57 See Kolsky (n.8), 673-82.

It was the 1857-58 crisis that restored the IPC as a legislative priority. As Fitzjames Stephen put it, "[t]hen came the Mutiny which in its essence was the breakdown of the old system…The effect of the Mutiny on the Statute Book was unmistakeable…"[58] Despite criticism of Governor-General "clemency" Canning, the revolt and its suppression underscored how colonial resorts to martial law and the courts martial of civilians, since the Irish and Canadian rebellions, had become increasingly controversial for the English political classes. The legitimacy of colonial rule was undermined by repressive responses that so obviously contradicted the formal claims of British constitutionalism and the rule of law, matters that soon again came into controversy with Governor Eyre's response to the 1865 insurrection in Jamaica.[59] Enactment helped to address such concerns and would – it was hoped – minimise future need to resort to emergency military expedients to uphold public order and British rule.

Revisions to Macaulay's draft by Peacock's Commission were finalised in 1858, and the IPC was enacted in October 1860, with amendments that eased the Benthamite tone of Macaulay's draft and marked some restoration of more familiar English doctrines, as well as significant doctrinal developments since Macaulay's time.[60] European resistance to the idea of equal legal status with indigenous subjects delayed the IPC coming into effect until 1862, when new criminal procedures clarified that European residents were not obliged to appear before Indian judges and magistrates. Courtney Ilbert's attempt to restore Macaulay's aim of uniform criminal jurisdiction for all British subjects in India sparked the so-called "white mutiny" in 1883.[61]

In London, John Stuart Mill immediately praised Macaulay's draft in the *Westminster Review* and echoed Macaulay's hope that his code would inspire stalled English efforts to codify.[62] Utilitarians' hopes were to be disappointed. The IPC was dismissed by the established English bar and bench, regarded as suitable only for backward overseas colonies where it was necessary (as Parker describes the

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58 Quoted in Setalvad (n.27), 124.

59 See Kostal (n.8).

60 The insanity defence, developed from the M'Naghten Rules, is an example of the latter: see G. Ferguson, "Insanity", in Chan, Wright, Yeo (eds) (n.5), 238-40. Henry Maine, law member of Council (1862-69) still objected to the code's Benthamite hue, suggesting "…nobody cares about criminal law except theorists and habitual criminals" (quoted in Smith, *Stephen* (n.4), 127).

61 The IPC did not take effect until 1862, further delayed until passage of criminal procedure legislation confirmed special European status, marking perhaps the biggest retreat from Macaulay's objectives, and the jurisdictional autonomy of the Princely states. Maine's successor Fitzjames Stephen added more procedural changes and an *Evidence Act* in 1872. On the 1883 crisis, see Kolsky (n.8).

62 (1838) 31 Westminster Review 395.

attitude) "…to keep things simple for the native population and magistrates of limited ability."[63] Such was the depth of the hostility from the self-appointed guardians of the common law and English legal culture, that the *Law Times* obituary for Macaulay in 1860 read:

> "[H]is code is … wholly worthless … [with] scarcely a definition that will stand the examination of a lawyer or layman for an instant, and scarcely a description or provision through which a coach and horses may not be driven. All hope of Macaulay as a lawyer, and also as a philosopher was over as soon as his code was seen."[64]

Mid-19th century criminal law reformers therefore proceeded with much more caution as conservative professional resistance to ambitious legislative reform and defences of the common law solidified. The utilitarian critique was further deflected by procedural reforms and appeals, new treatise literature that prompted more sophisticated legal doctrine, and the scholarship of figures such as Henry Maine, which enhanced the modern legitimacy Blackstone had lent to the common law. The legal positivists such as John Austin sought to render Bentham's legacy more palatable and found common cause with the more conservative legal scholars, as law emerged as an academic discipline along with modern professional legal education.[65]

Fitzjames Stephen, who had a rather more positive view of the IPC than Maine, his predecessor in India, returned to England to draft a code which, while failing domestically, was a significant influence on the Canadian, New Zealand and Queensland codes. While Macaulay aspired to break decisively from the common law, Stephen sought accommodation with it. Bentham's injunction to reformulate criminal law anew was openly abandoned in favour of proceeding from a synthesis of existing laws in a rationalised form that was only loosely utilitarian and reflected Stephen's conservative sensibilities. Wary of conceptual abstraction, he had a much more positive view of the common law and judicial discretion than Macaulay and Bentham.[66] Stephen's treatises, *A General View of the Criminal Law of England* (1863) and *A Digest of the Criminal Law* (1877), were important steps to a modest and narrow codification of

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[63] G. Parker, "The Origins of the Canadian Criminal Code", in D.H. Flaherty (ed.), Essays in the History of Canadian Law (University of Toronto Press 1981), vol. 1, 251.

[64] "Obituary", *Law Times* (London, January 7, 1860), 184.

[65] See Wright (n.9). Many of Macaulay's successors in India were prominent figures in later nineteenth-century English legal theory circles, and Smith, in Lawyers, Legislators and Theorists (n.4) and James Fitzjames Stephen (n.4), maps these connections.

[66] See Smith, James Fitzjames *Stephen*, (n.4).

indictable offences that left defences and the principles of liability to the common law. His 1878 Draft English Code, derived directly from his *Digest*, was taken up by the government, and a royal commission converted it into a bill, introduced in 1880. The bill died with the fall of the government – this was the closest England and Wales ever came to codification, despite subsequent efforts, including the recent work of the Law Commission (1968-2008).[67]

The prospects for codification were better in other British jurisdictions, including those that enjoyed increasing self-government, where Stephen's code, not the IPC, became a primary external reference.[68] Changes to the IPC continued in the later colonial period, through adoptions elsewhere, both in British Asia, and after independence.[69] The IPC was first proposed for the Straits Settlements in 1867 and enacted in 1871 – opposed by influential members of the Singapore bar and bench, but favoured in Penang on the basis of demonstrated success in India.[70] The Colonial Office promoted similar codification in other colonial settings, and the IPC was adopted elsewhere in South Asian and some African colonies, and also inspired

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[67] Stephen's caution did not satisfy the defenders of the common law, Lord Chief Justice Cockburn declaring, disingenuously, that the proposal was inconsistent with the idea of codification, and that no code was better than a half-baked one. Momentum was lost with Cockburn's hostile intervention, the Home and Lord Chancellor's Office reservations about introducing large reforms whilst the bar contended with new procedures under the *Judicature Acts* 1873 to 1894, and government distractions with political issues such as the Irish question: see Smith, *James Fitzjames Stephen* (n.4), 44-72, 78-82; Smith, *Lawyers, Legislators and Theorists* (n.4), 143-50. On recent efforts see C. Clarkson, "Recent Law Reform and Codification of the General Principles of Criminal Law in England and Wales: A Tale of Woe", in Chan, Wright, Yeo (eds) (n.5), 337; "RIP: The Criminal Code (1968-2008)" (editorial) [2009] Criminal Law Review 1. On the challenges of principled criminal law reform and legislative rationalisation today, see M. Findlay, "Principled Criminal Law Reform: Could Macaulay Survive the Age of Governing Through Crime?", in Chan, Wright, Yeo (eds) (n.5), 365; and S. Bronitt, M. Gani, "Criminal Codes in the 21st Century", in B. McSherry, A. Norrie, S. Bronitt (eds), *Regulating Deviance: The Redirection of Criminalisation and the Futures of Criminal Law* (Hart 2009), 235.

[68] M.L. Friedland, "Codification in the Commonwealth: Earlier Efforts" (1990) 2 Criminal Law Forum 145; B. Wright, "Criminal Law Codification and Imperial Projects: The Self Governing Jurisdiction Codes of the 1890s" (2008) 12 Legal History 19.

[69] The IPC is the basis for criminal codes in Pakistan, Mauritius, Sri Lanka, Malaysia and Singapore. In some IPC jurisdictions, retrograde changes include retreats from Macaulay's liberal approach to political offences with the addition of sweeping national security and emergency measures, theocratic retreats on religious pluralism, and the expansion of capital punishments and reintroduction of corporal punishments. On technical legal retreats, both legislative and judicial, see the chapters in Chan, Wright, Yeo (eds) (n.5).

[70] Andrew Phang, "Of Codes and Ideology: Some Notes on the Origins of the Major Criminal Enactments of Singapore" (1989) 31 Malaya Law Review 46

William Badgley's 1850 proposed code for the Province of Canada.[71] The Jamaican crisis in the latter 1860's helped prompt the Colonial Office to commission Robert Wright to draft a code in 1877, versions of which were adopted elsewhere in the West Indies and further afield.[72]

Apart from these "imposed" colonial codes, conditions favoured codification in the increasingly autonomous self-governing British jurisdictions. The complexities of received English criminal laws and subsequent local amendments were compounded by the emergence of new colonies out of the territories of older ones (*e.g.*, Upper Canada from Quebec, New Brunswick from Nova Scotia, Victoria and Queensland from New South Wales) and by colonial union (Upper and Lower Canada, 1840, prefacing the larger challenge faced by the Dominion of Canada in 1867).[73] Consolidations had simplified the accumulated layers of law, but further rationalisation, a succinct complete *compendium* in the form of codification, was appealing in colonial and frontier settings where the bar and bench

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[71] See Colonial Office circulars, *e.g.* "Some Considerations Preliminary to the Preparation of a Penal Code for the Crown Colonies", and Sir Henry Taylor's treatise (later appended to Wright's Jamaica draft), in War and Colonial Department and Colonial Office, *Subjects Affecting Colonies Generally, Confidential Print* (The National Archives (U.K.), CO 885/3/19, May 20, 1870). On colonial Canada's early flirtation with the IPC, see G. Blaine Baker, "Strategic Benthamism: Rehabilitating United Canada's Bar through Criminal Law Codification, 1847-54", in J. Phillips, R. McMurtry, J. Saywell (eds), *Essays in the History of Canadian Law, Vol. X: A Tribute to Peter N. Oliver* (Osgoode Society 2008), 257. On the IPC in Australia, see Greg Taylor, "Macaulay's Indian Penal Code – A Success at Home, Overlooked Abroad", *post*, 51.

[72] See M.L. Friedland, "R.S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law" (1981) 1 Oxford Journal of Legal Studies 307. Although never enacted in Jamaica itself, Wright's code displaced the IPC as the model code promoted by the Colonial Office. Influenced more by Brougham's English Law Commissioners than the IPC, the Jamaica code was less radical a departure. Wright rejected Macaulay's use of examples, but he did set out a general part to define liability standards (see Smith, *Lawyers, Legislators and Theorists* (n.4), 151-52). After an attempt by Fitzjames Stephen's son Henry to draft a new model code for the Colonial Office, Samuel Griffith's 1899 Queensland Code, introduced to Lagos by Griffith's colleague William MacGregor, became a primary influence on Albert Ehrhardt's 1925 Colonial Office model code. This was adopted widely in numerous African colonies, including those where the IPC had been enacted: see R.S. O'Regan, "Sir Samuel Griffith's Criminal Code" (1991) 7 Australian Bar Review 141; "The Migration of the Griffith Code" in O'Regan (ed.), *New Essays on the Australian Criminal Codes* (Law Book 1988), 103; and Taylor, (n.71), *post*, 51.

[73] *Calvin's Case* (1608) 77 ER 377 and imperial instructions governed the informal reception of English law. English criminal laws tended to be formally received as the foundation of a jurisdiction's criminal laws when legislative institutions and colonial courts were first established, empowered to amend these laws as local conditions required, subject to imperial supervision (*i.e.* Colonial Office review of legislation and possible disallowance by Westminster, appeals for the Judicial Committee of the Privy Council after 1833, and supervening imperial legislation).

faced real practical challenges of access to sources of law.[74] Receptiveness to codification was also enhanced by local struggles for responsible government and criminal law reform, informed by experiences of abuse of executive powers in colonial government and the administration of justice. Reformers associated codes with constraint on state powers and self-government, providing a constitutional momentum lacking in England itself.[75] While these jurisdictions were unreceptive to imposed codes written by imperial administrators, Stephen's Draft English Code was not burdened with such colonialist baggage, and it was the most up to date synthesis of doctrines familiar to all. His modest, pragmatic approach was loose enough in conception to combine easily with local consolidations. Local developments could be more readily accommodated than in a more ambitious comprehensive code. So it is unsurprising that Stephen became the primary external reference for the Canadian (1892), New Zealand (1893) and Queensland (1899) codes.

The first of these was given impetus by the strong consensus during the Confederation debates that criminal law should come under the jurisdiction of the proposed federal parliament. The immediate example of the US Civil War highlighted the perceived dysfunctions of a decentralised federation, and criminal law was regarded as important as national defence in securing the Dominion of Canada's sovereignty and development priorities. The first Prime Minister, John A Macdonald, retained the Justice portfolio and dealt with the challenge of reconciling the diverse criminal laws of the British North American colonies (each had received English criminal laws at a different time and amended them in different ways[76]) by simply adopting Greaves' 1861 English Consolidations as the basis for the 1868-9 Dominion Consolidations. A long series of amending acts proved necessary and were being reworked into the Revised Statutes of Canada by Deputy Minister of Justice, George Burbidge, when the 1885 North West Rebellion broke out. This crisis highlighted the limitations and the incompleteness of the Dominion Consolidations, and Burbidge began work on a Canadian edition of Stephen's 1877 *Digest* to replace the heavily relied upon but unwieldy contemporary edition of *Archbold's Pleading*. It was a short step to drafting a Canadian version of Stephen's Draft English Code. Having studied the debates at Westminster, Justice Minister John Thompson astutely managed Parliament and the bar and bench. The 1892 Canadian

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74 See D.H. Brown, *Genesis of the Canadian Criminal Code of 1892* (University of Toronto Press 1989), 42, 71.

75 See Wright, "Criminal Law Codification and Imperial Projects" (n.68). On the lack of constitutional momentum in England, see Smith, *James Fitzjames Stephen* (n.4), 83-84; Farmer (n.4), 423-24.

76 See n.73.

Criminal Code is both conceptually and organisationally Stephen's Draft English Code, and about 40 *per cent* of the substantive provisions taken directly from it, 60 *per cent* from the revised Dominion consolidations.[77]

The first criminal code in the British Empire (India) and the first self governing British jurisdiction code (Canada) can therefore be seen as reflections of different phases of the 19th century English criminal law reform debates. This is not to suggest they were simply products of the metropole, or to minimise the place of local influences on their development, but both codes were shaped by this law reform context and pervasive legal connections within a common global network. Macaulay's inspiration was Bentham and his rejection of the common law; Burbidge's was Stephen, who openly rationalised existing laws and sought accommodation with them.

New Zealand initiated codification before Canada in 1883, but legislative difficulties delayed enactment to 1893.[78] Samuel Griffith's Queensland Code, like the Canada and New Zealand codes, borrowed heavily from Stephen's legislative renderings of the common law, which were added to statute based provisions derived from local consolidations. However, unlike Canada and New Zealand, Griffith abandoned Stephen's narrow conception of codification and its preservation of the common law for defences and principles of liability. His more comprehensive approach, which included a general part, was inspired by Zanardelli's 1889 Italian Code rather than Macaulay's IPC.[79]

The IPC had little influence beyond the Straits Settlements and the other colonies of British South Asia, and was replaced by other

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[77] See Brown (n.74); D.H. Brown, B. Wright, "Codification, Public Order, and the Security Provisions of the Canadian Criminal Code", in B. Wright, S. Binnie (eds), *Canadian State Trials, Volume III: Political Trials and National Security Measures, 1840-1914* (University of Toronto Press 2009), 515.

[78] See J. Finn, "Codification of the Criminal Law: The Australasian Parliamentary Experience", in B. Godfrey and G. Dunstall (eds), *Crime and Empire, 1840-1940: Criminal Justice in Local and Global Context* (Willan 2005), 224; S. White, "The Making of the New Zealand Criminal Act of 1893: A Sketch" (1986) 16 Victoria University of Wellington Law Review 361.

[79] See Wright, "Criminal Law Codification and Imperial Projects" (n.68); O'Regan (n.72); Alberto Cadoppi (K.A. Cullinane tr.) "The Zanardelli Code and Codification in the Countries of the Common Law" (2000) 7 James Cook University Law Review 116. The 1889 Italian Code and Field's 1881 New York State Code were the source of a small handful of substantive provisions (far fewer than Stephen). As with the Mutiny, the Eyre controversy, and the 1885 North West Rebellion, public order concerns helped to make these large code projects a legislative priority: New Zealand's project was initiated 1883 as tensions mounted during Maori resistance and indefinite detentions in response to land confiscations, while a general strike, the emergence of the Labor Party and concerns about disruption of the federation discussions were factors in Queensland.

codes in the few African colonies where it had been enacted under Colonial Office direction.[80] Common law culture, reflecting the hostile attitudes of the English bar and bench, and directed more at the general idea of comprehensive codification rather than the specific features and content of the IPC, appears to have had more professional traction in some British settings than others. In Canada and New Zealand, Stephen's accommodation with the common law was regarded by most as a satisfactory compromise. Another factor affecting Macaulay's wider influence was the view that a code drafted in 1837 had become dated, and this assumption is clearly articulated in the later 19th century and early 20th century Colonial Office model code projects. Greg Taylor's study in this issue further illustrates these points with the case of two Australian jurisdictions, New South Wales and Tasmania, and a non-British setting, Germany – all potential candidates for the IPC, in that attention was drawn to it by scholars, judges and legislators there. Ironically, the features of the IPC that impress today, such as Macaulay's lucid and concise expression and use of illustrations, worked against its wider adoption, Taylor suggests, because of the assumption that such an approach is inappropriate in more advanced, sophisticated settings with developed legal professions.

IV. CONCLUSIONS

Macaulay's law reform legacy is a mixed one. For legal scholars assessing it on technical grounds, the IPC remains an impressive legislative reform, notwithstanding the vicious attacks on Macaulay and dismissal of the IPC by the 19th century defenders of the common law. It was a huge advance on the existing English laws during Macaulay's time, and many of its qualities remain progressive in the 21st century, despite the many retrograde changes made to Macaulay's draft since its enactment, and long experience of legislative neglect and judicial constructions. For historians, Macaulay's legacy is rather more problematic, illuminating matters of context and of larger forces that distorted the progressive aims of his law reforms. The IPC was the product of Macaulay's time and place and privileged position, and it was hardly surprising that he was unable to legislate entirely anew and drew heavily from the doctrines he was familiar with. His project also had wider purposes than efficient criminal justice. It marked a modernising turn in British colonial policy that involved a broader reconstitution of authority designed to make British law, and by extension British colonial rule, more effective and legitimate. The private defence provisions,

[80] See n.71 and n.72.

appearing to be a bold departure, serve as a good illustration of the limitations and wider context of Macaulay's reform.

While the experience of the IPC illustrates the limits of the progressive possibilities of criminal law reform in the face of larger pressures, it is reductionist to cynically dismiss the IPC as essentially an exercise in power, just as it is simplistic to patronisingly dismiss it as appropriate only for backward settings deficient in common law culture. Macaulay's project was a manifestation of the leading law reform ideas of his time and the positive qualities of the IPC as a comprehensive and progressive criminal law reform endure.

MACAULAY'S IPC – A SUCCESS AT HOME, OVERLOOKED ABROAD

GREG TAYLOR[*]

ABSTRACT

Macaulay's Penal Code has been a remarkable success. It has endured in India and several other countries in the region for over a century and a half. But it has had few imitators. Unlike Sir Samuel Griffith's Criminal Code for Queensland, for example, it has not spread around the world. This paper looks at three opportunities to use the Code as a resource for further law reform that were allowed to pass by – in New South Wales, Tasmania and Germany. In each of these jurisdictions, attention was drawn to the Code, but there was no follow-up. The principal explanation for the lack of enthusiasm for borrowing from this most successful Code is that Macaulay's drafting style was far ahead of his time. But, despite the lack of detailed borrowing from the Indian Penal Code, the fact that codification had been successful in India did give some confidence to those proposing codes elsewhere.

I. INTRODUCTION

It is well known how successful Macaulay's Penal Code, as revised by Peacock, has been in its home jurisdiction of India and Pakistan, and in its own region. It must however be noted that its success is merely part of, and indeed pales beside, the stupendous achievement of twentieth and twenty-first century India in maintaining and enhancing another of its inheritances from British rule – the rule of law – within a country of such great diversity and, in parts, deprivation. Drafted by Thomas Babington (Lord) Macaulay from 1835 to 1837, during his time as law member of the Governor-General's Council, and enacted in 1860, in the wake of the Indian Mutiny, with some revisions by (Sir) Barnes Peacock,[1] the Indian Penal Code has survived over a century and a half of enormous change on almost all imaginable fronts. But how successful and influential was the

[*] Associate Professor, Law School, Monash University. The author wishes to thank Ian Leader-Elliott for suggesting this topic, Prof. Thomas Vormbaum (see n.36, *post*), Dr Stefan Petrow (see n.27, *post*) and Dr Rüdiger Hitz for assistance in finding one of the sources cited. The usual *caveat* applies.

[1] The story is told in brief in R. Cross, "The Making of English Criminal Law: (5) Macaulay" [1978] Criminal Law Review 519, and in more detail in B. Wright, "Macaulay's Indian Penal Code: Historical Context and Originating Principles", in W.C. Chan, B. Wright, S. Yeo (eds), *Codification, Macaulay and the Indian Penal Code: the Legacies and Modern Challenges of Criminal Law Reform* (Ashgate 2011), ch. 2.

Macaulay Code as a model in the broader British Empire, and even beyond? The answer is, unfortunately: not much at all.

Macaulay certainly hoped that his Code would be influential in the common-law world, not merely the law of India.[2] By 1911 it was being said by a well-read Welsh solicitor in the "Law Quarterly Review" that the Indian Penal Code was "too well known to call for anything more than a mere reference";[3] however, the sincerest form of flattery has not often been bestowed upon it. It has never been mined for ideas to any significant extent, in any other jurisdiction, despite there having been plenty of opportunities to do so and plenty of ideas in it available for mining. In New South Wales in the 1870s, Tasmania in the 1920s, and even in Germany in the 1860s, in the decade following the enactment of the Indian Penal Code, the day might have been seized and some inspiration obtained from the Indian Penal Code.

These jurisdictions have been selected for analysis in this paper because, in each of them, influential people – Judges, academics or even the drafters of Codes themselves – were aware of the Code and could have used it, but chose not to do so to any perceptible extent. There were many topics – picking one almost at random, presumed consent to medical procedures in case of incapacity – which, as we shall see, had been very well thought through by Macaulay. His solution to that and other puzzles in the criminal law deserved at least to be considered for imitation, but remains to this day entirely unemulated in any other jurisdiction.

This article will outline the occasions on which something might have been done, and then consider why it was not.

II. MISSED OPPORTUNITIES

A. The Law Reform Commission of New South Wales and the proposed consolidation

The major reform of the criminal law in New South Wales in the nineteenth century was the *Criminal Law Amendment Act* 1883, which merits seven of the twenty-nine chapters in Woods' *History of the Criminal Law in New South Wales*.[4] The Act's genesis goes back to a pamphleteering campaign by assorted would-be law reformers (mostly concerned with the civil law) in the late 1860s, followed by

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2 T. Pinney (ed.), *Selected Letters of Thomas Babington Macaulay* (Cambridge University Press 1982), 154 ff.

3 H.I. Randall, "The Resurrection of our Criminal Code" (1911) 27 Law Quarterly Review 209, 212. Randall's obituary may be found in the *The Times* (London, November 9, 1964), 12.

4 G.D. Woods *History of the Criminal Law in New South Wales: The Colonial Period, 1788-1900* (Federation Press 2002).

the establishment of the Law Reform Commission in 1870. That Commission produced a draft Bill (and little more, as it was found impractical to have a part-time commission), which, after much travail which it is not necessary to recount here, was eventually enacted as the *Criminal Law Amendment Act* 1883 (N.S.W.).[5]

The Law Reform Commission was chaired by Sir Alfred Stephen, then towards the end of his term as Chief Justice of New South Wales, which had commenced in 1844 and was to conclude in 1873. His cousin was Sir James Fitzjames Stephen, who at the same time as the Commission's deliberations was in India as the law member of the Viceroy's Council, the position previously occupied by Macaulay himself. On his return Sir J.F. Stephen famously pronounced that English criminal law stood in relation to the Macaulay Code "like *Cosmos* [to] *Chaos*".[6]

But his cousin, engaged in the work of consolidation rather than codification in New South Wales, did not trouble himself with a glance at the Macaulay Code when he began to draft his consolidating Act. It was not mentioned in the Commission's official report; although the Commissioners stated that they had looked at "some other codes, colonial and foreign",[7] these appear to have been largely other Australian statutes. Their draft statute indicated in marginal notes the sources from which its various provisions were taken, and the Indian Penal Code was not among them. Nor did Stephen C.J. mention it in two long letters to the *Sydney Morning Herald*[8] in January 1875 when he had had a fair opportunity to acquaint himself with his cousin's assessment of the Indian Penal Code, even though he did find room for the information that the Prussian and French Codes had been imposed from above rather than democratically. As he continued to lobby for his Bill to be enacted, he published a pamphlet

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5 In addition to Woods, *ibid.*, the story is told in J.M. Bennett, *Sir Alfred Stephen: Third Chief Justice of New South Wales 1844-1873* (Federation Press 2009), 363-75; J.M. Bennett, "Historical Trends in Australian Law Reform" (1970) 9 University of Western Australia Law Review 211, 213.

6 Quoted in, for example, K.J.M. Smith, *James Fitzjames Stephen: Portrait of a Victorian Rationalist* (Cambridge University Press 1988), 74. His turn of phrase must slightly puzzle those without Greek: Κοσμος has a variety of meanings in Greek, in addition to the one it has come to have in English, and one of them is "order". With this meaning, a form of the word occurs in Book 21 of the Odyssey, where the following lines, which might also be applied to Macaulay's Code, may be found: "τάφος δ᾽ ἕλε πάντας ἰδόντας, ὡς εὐκόσμως στῆσε: πάρος δ' οὐ πώ ποτ' ὀπώπει" ("amazement seized all observers that he had made order so well: never before had he seen such").

7 Legislative Assembly, *New South Wales Parliamentary Papers*, vol. II, 1870-71, 117, 119. It is necessary to recall here that "code" was used in a looser sense in the nineteenth century, and included what we should call merely a consolidation.

8 *Sydney Morning Herald* (Sydney, January 19, 1875), 7; *Sydney Morning Herald* (Sydney, January 27, 1875), 5.

in the following year on it, but again showed not the slightest awareness of the Indian Penal Code.[9]

Certainly other people in New South Wales knew of the Indian Penal Code. On March 12, 1873, the *Sydney Morning Herald*[10] published an article copied from the *Examiner* which, as well as quoting the "cosmos to chaos" statement, went on to opine that the "Indian Penal Code is a great advance from the Code Napoleon; its definitions are very much better, and the method of illustrative instances introduced by Lord Macaulay is an addition to the art of drafting".

Even more remarkably, the *Sydney Morning Herald* of July 30, 1874,[11] contained a contribution by (Sir) Lyttelton Bayley, formerly the Attorney-General for New South Wales and by then a Judge of the High Court of Bombay. It had been written, the newspaper tells us, in September 1870, and then sent to the Law Reform Commission; this was well before the Commission handed in its draft Bill in March of the following year. Why this four-year-old news was considered worthy of publication is not apparent; it may be an echo of the visit of David Dudley Field to New South Wales in the previous year; but obviously someone wished to keep the project of law reform before the public eye.

Bayley A.-G., later to be author of the missive from Bombay, has gone down in the history of New South Wales largely because he was appointed Attorney-General only two months after his arrival in the colony, a fact which caused great *Angst* in the local legal community – the competition between local and imported candidates for office, usually but not always judicial, was a recurring theme in all the Australian colonies in the nineteenth century. Daniel Deniehy was moved as a result to write the once-famous satire *How I Became Attorney-General of New Barataria*, clearly targeted at Bayley A.-G. but also at the entire system which allowed such "johnnies-come-lately" to be appointed.

At any rate, Bayley J.'s assessment of the Indian Penal Code under which he was then working was very positive, and deserves to be rescued from oblivion for that reason alone. It makes the lack of any official reference to the Code in the ongoing discussions even more puzzling.

> "Although lawyers did not quite profess to understand or like it at first, it has worked its way, and is now received with general approbation: and certainly to have the whole criminal law (except certain local and other special laws) in 511 sections,

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[9] *Introduction to the Law Reform Commissioners' Report and Criminal Law Consolidation and Amendment Bill* (Government Printer, Sydney 1876).

[10] "The Codification of the Law", *Sydney Morning Herald* (Sydney, March 12, 1873), 6.

[11] L. Bailey, "Law Reform Commission", *Sydney Morning Herald* (Sydney, July 30, 1874), 5.

> in the clear terse English of Macaulay, and without the technical jargon of English criminal law is an enormous gain.
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> "I arrived in Bombay in January 1861, and therefore saw the practical working of the old system during eleven months. I prosecuted and defended a great number of prisoners, until I was made Her Majesty's Advocate-General in March 1866, when, as I thus became the confidential legal adviser to the government, they refused to allow me to appear on behalf of prisoners; after which I prosecuted for [the] government all the important cases. Since I have been on the Bench (*i.e.* since April 1869), I have presided at two criminal sessions, and I can say without the slightest hesitation, and with a perfect recollection of the practice of the criminal Courts in New South Wales, that our present system in India is a vast improvement on all the old ones I have seen since I was called to the Bar in 1850.
>
> "[…]
>
> "The present Code has been amended in one or two slight instances, but it has worked so well that no serious amendment is contemplated.
>
> "It is based much on the French penal code in arrangement."

Mr Justice Bayley concluded by making a series of recommendations to the Commission, of which the ninth was: "Consult the Indian Penal Code and Jeremy Bentham, the French and other Codes of Europe and the United States, if Macaulay's Code is not approved of". Against this background, Sir Alfred Stephen's snubbing of the Indian Penal Code – for it virtually amounts to that – is even more remarkable.

Only in 1881, towards the end of the travails of Sir Alfred Stephen's consolidating Bill for New South Wales drafted in 1871, was any attention paid to India by legislators in office in New South Wales. In the Legislative Council, Thomas Holt, who was not legally trained but took a deep interest in the criminal law and had been a magistrate, suggested the adoption of Macaulay's Code and quoted a number of statements in praise of it – including, pointedly and perhaps rather tactlessly, those by Sir J.F. Stephen. He had found a copy of the Code in the Parliamentary Library, and suggested that "this excellent code prepared by so eminent an authority"[12] should be printed and distributed to members. Then they would see at once that it was greatly superior to the mere codification then before the House. There was, furthermore, no need to copy English legislation, as the precedent of the introduction of the Torrens system showed.[13]

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12 New South Wales Parliamentary Debates, Legislative Council, July 27, 1881, 308.

13 In 1858, Robert Torrens instituted a central land registry for South Australia, replacing existing common law deeds of land. This was later enshrined in the *Real Property Act* 1886 (S.A.), and ultimately extended to all of Australia, and many other

Holt's motion to throw out the consolidating Bill failed by one vote to twenty-six.[14] As well as the fact that the Indian Penal Code was unknown to most if not all members, much time and effort had been invested, not least by Sir Alfred Stephen, in the Bill then before the House, and it was an uphill battle to suggest scrapping it and starting again.

Sir Alfred Stephen, for his part, had long refused to include in his Bill a positive definition of murder such as might appear in a proper code as distinct from a consolidation of statute law; at around the same time, however, he gave way on this point alone.[15] In re-drafting what was to become section 9 of the *Criminal Law Amendment Act* 1883, he belatedly referred to the Indian Penal Code, and indeed quoted its definition of murder, alongside several other existing or proposed codes, in his *Criminal Law Manual*,[16] published as a commentary on the new law.

The Indian Penal Code was not mentioned anywhere else in that publication, and there was no sign that Sir Alfred Stephen had read any other provisions of Macaulay's remarkable Code, or taken any inspiration at all from it. The definitions of murder in India and New South Wales, moreover, did not obviously owe anything much to each other.

Sir Alfred Stephen's response to suggestions for a full-scale code was to point out that his task was consolidation and importation of the latest English reforms, not codification or comparative law, and that he had enough trouble with the former task without taking on the added burden of the latter.[17] This response could certainly not be dismissed out of hand, given the immense effort that was required to get a simple consolidation through, in a democratically governed polity like New South Wales, as distinct from India. But it is nevertheless a shame that nothing at all, beyond the reference to the definition of murder, was made of Macaulay's remarkable production. It was a wasted opportunity to make far greater improvements – whether or not going so far as codification.

B. Tasmania

By the start of the 1920s, criminal codes, properly so called, had been enacted in two Australian States (Queensland and Western Australia) and ultimately unsuccessful attempts at codification had been made in

jurisdictions (*e.g.* seven Canadian provinces, New Zealand, Malaysia and Singapore). See further J.E. Hogg, *The Australian Torrens System* (Clowes 1905).

14 *Sydney Morning Herald* (Sydney, July 28, 1881), 2.

15 Woods (n.4), 297, 310 ff., 319-321.

16 (Government Printer, Sydney 1883), 10, 203 ff.

17 Woods (n.4), 345.

two others (South Australia[18] and Victoria[19]). Neither of the two sets of unsuccessful drafters referred to the Indian Penal Code to any extent, and there appears to be no reference to it in the histories of Sir Samuel Griffith's Code for Queensland[20] nor in any newspaper in Western Australia over the period during which that State adopted the Queensland Code.[21] Thus the visitor to the Victorian Public Record Office alights from the train at the station named Macaulay and walks to it from there along Macaulay Road, but will look in vain for traces of its namesake's Indian Penal Code inside the archives themselves.

In Tasmania, however, the younger Andrew Inglis (later Mr Justice) Clark certainly was aware of and admired the Macaulay codification. In two newspaper articles published at Hobart and Launceston on March 15, 1924,[22] just a few weeks after his principal contribution to drafting the Code had been made and it was before Parliament,[23] he stated (in identical words in both pieces) that the Indian Penal Code "has worked admirably. No greater praise could be bestowed on it, and as has been truly said, 'it is one of the noblest monuments of Macaulay's genius'."[24]

However, there is no record of the Indian Penal Code's having been used in the drafting – there are much more obvious and closer candidates for that honour.[25] The Library of the Supreme Court of Tasmania has never possessed a copy of it,[26] although it is conceivable that Clark himself owned one or borrowed one from somewhere else. Stefan Petrow, the historian of the Tasmanian

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18 G. Taylor, "Dr Pennefather's Criminal Code for South Australia" (2002) 31 Common Law World Review 62.

19 G. Taylor, "The Victorian Criminal Code" (2004) 23 ***University of Queensland Law Journal*** 170.

20 Such as Robin O'Regan, "Sir Samuel Griffith's Criminal Code" (1990) 7 Australian Bar Review 141.

21 A digital search was conducted on the Trove Newspapers database: <http://trove.nla.gov.au/newspaper> accessed May 20, 2012. Neither the author, nor Ian Leader-Elliott, knows of any such reference.

22 "Criminal Codes – Codifications, Ancient and Modern – Historical Notes – The Development of Ages", *The Mercury* (Hobart, March 15, 1924), 9; "Codification of Criminal Law – An Historical Sketch", *The Examiner* (Launceston, March 15, 1924), 3.

23 S. Petrow, "Modernising the Law: Norman Kirkwood Ewing (1870-1928) and the Tasmanian Criminal Code 1924" (1995) 18 University of Queensland Law Journal 287, 300 ff.

24 The quotation is from J. Bryce, *The Ancient Roman Empire and the British Empire in India* (Oxford University Press 1914), 118.

25 Note, however, the qualification that much of the Tasmanian Code comes from England rather than Queensland: R. O'Regan, *New Essays on the Australian Criminal Codes* (Law Book 1988), 119.

26 E-mail from Dorothy Shea of the Library to the author (October 24, 2011).

Criminal Code, has found nothing in the materials suggesting any Indian influence.[27]

Puzzlingly, though, in May 1925 the President of the Southern Tasmanian Law Society, one F. Lodge, stated to a meeting of that Society:

> "Macaulay's Code was doubtless based on the French Penal Code, but it covered not only crimes and punishments, but also procedure. It had been in operation for more than sixty years, and, so far as he knew, had met with acceptance. On it the Queensland Code was based, and on the Queensland Code was based the Tasmanian recent Code, with some amendments, which was now on its trial in certain respects."

At least, that is what the report in the newspaper[28] says he said.

If it is a true report, it contains at least three statements unrelated to the Tasmanian Code which are wrong or at least very debateable. Nevertheless it would be one thing to err about the sources on which Macaulay drew, for example; it would be another thing to err about the enactment of a Code on one's own doorstep only a year earlier. Could Macaulay's Code have had more influence in Hobart than the archival sources reveal?

Its text gives no grounds for any such hypothesis. Perhaps our speaker meant only that the possibility of a successful codification in the common law's realm was demonstrated by Macaulay's Code. This is something that could be known and of use even in the absence of a copy of the Indian Penal Code itself. Even if this is all Mr Lodge meant – and the suspicion must be that it was – it is still a feather in the cap of the Code: while Macaulay may not have influenced the drafting in detail, his achievement showed that the whole enterprise was not pointless. But as far as direct influence of the one on the wording of the other is concerned, there is nothing to report. Macaulay could have provided a number of suggestions of detail as well as reassurance about the whole project. But the opportunity was, again, wasted.

C. Germany

The current Criminal Code of Germany may be traced back to that of the North German Confederation, a Code which came into force in 1870, only ten years after Macaulay's Code, and from there back to the Prussian Code of 1851, fourteen years after Macaulay's draft had been handed in to the Governor-General.

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[27] See n.23, *ante*. Dr Petrow has undertaken a re-examination of the materials, at the author's request.

[28] "Southern Law Society – Civil Law Procedure – President's Recommendations", *The Mercury* (Hobart, May 23, 1925), 3.

That Macaulay's Code was not drawn on by the drafters of either German code is perhaps unsurprising, given that the barriers of language and distance which were much greater in those days. Those barriers did not, however, prevent Macaulay's Code from coming to the attention of two front-rank German professors of criminal law: once in 1839, only a couple of years after it had been submitted to the Governor-General, and during a period when many of the smaller German states were considering or had just enacted their own codes; and again in 1937, when it was almost a century old, and Germany was ruled by the Nazis.

In 1839, Carl Joseph Anton Mittermaier published an article[29] in which he reviewed several new codifications or drafts, including Macaulay's Code, to which he devoted several pages. Mittermaier was a major figure in German criminal law of the nineteenth century. He has been rightly called the "most significant and best internationally known German criminal law academic of his time" and "the founder of modern German comparative criminal law studies".[30] He had worked fast: 1839 was only the second year after Macaulay's Code had been handed to the Governor-General, and over twenty years before it was finally enacted.

It cannot be said that Mittermaier's analysis was particularly profound. Much of what he wrote consisted in translations or paraphrases of the introduction to the Code or its provisions. At one point, in discussing provocation, he appears to confuse murder and manslaughter. He did however approve of the Code in general.

> "The whole production, which contains a complete systematic Code, is a work which shows the great practical spirit and intelligence of the commissioners, and the attached notes will be read by every jurist with the greatest interest."[31]

He did not, however, approve of the illustrations, as they might lead to "too much prolixity and would not achieve their goal, as isolated illustrations in a Code can easily mislead a Judge".[32]

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[29] „Über den neuesten Zustand der Strafgesetzgebung mit besonderer Rücksicht auf das neue Strafgesetzbuch für das Großherzogthum Weimar, sowie die Entwürfe von Strafgesetzen für England, für Indien, für Nordamerika, für das Großherzogthum Baden, für das Großherzogthum Hessen, für den Kanton Bern und Kanton Thurgau" ("On the latest state of the criminal law with special reference to the new Penal Code of the Grand Duchy of Weimar, as well as the draft criminal codes for England, India, North America, Grand Duchy of Baden, the Grand Duchy of Hesse, the canton of Bern and the canton of Thurgau") [1839] Archiv des Criminal-Rechts (neue Folge) 325.

[30] A. Koch, "C.J.A. Mittermaier and the Nineteenth Century Debate about Juries and Mixed Courts" (2001) 72 Revue internationale de droit pénal 347, 347 ff.

[31] Mittermaier (n.29), 329 (all translations from the German by the author).

[32] *ibid.*, 337 ff. Mittermaier also promised a further article on this topic (what he meant by the same topic being not entirely clear), which was to appear

Returning to this theme in a later article, he stated that the illustrations showed that "the area of criminal liability is too widely drawn and it is necessary to counteract this over-broad application by inserting limitations, exceptions or additions".[33] He does not seem to have grasped that the illustrations in Macaulay's Code were not meant to be of that nature, but merely illustrations.

The importance of Mittermaier's article to this analysis is not so much those views, nor the wider context in which Mittermaier wrote – the debate on the desirability of codification was not quite over at this time, a debate which is known to English-language audiences through Savigny's famous work of 1814, *Of the Vocation of Our Age for Legislation and Jurisprudence* – but rather the fact that the Indian Penal Code was drawn to the attention of the German scholarly public so early. Mittermaier, moreover, lived until 1867, the eve of the enactment of the North German Confederation's codification of 1870, which is still the starting point for today's German Criminal Code. He was certainly active when the Prussian Criminal Code of 1851 was enacted, and this was an important source for the all-German Code of the 1870s. But there does not seem to have been any thought of mining the Indian Penal Code for ideas rather than just reviewing it.

One who reads the modern German Criminal Code might imagine some influence from Macaulay's technique of providing illustrations. Thus § 243 I of the Code, for example, lists a number of "especially grave cases" of theft: theft by breaking in, from religious buildings, professionally, and so on. However, this technique of exemplification applies mostly in sentencing, and rarely if ever serves the function of clarifying the definition of the offence. A German writer on legislative technique of 1908 named Adolf Wach, who favoured the use of examples, provided a rather generously drawn list of examples to be found in the German Criminal Code in a contribution to a fifteen-volume work dedicated to comparative criminal law and meant to form the basis of a reform that never happened. Some of the other authors of that work certainly had access to the Indian Penal Code, but Adolf Wach did not mention it at all.[34] Thus even

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shortly in Tübingen's *Deutsche Vierteljahrsschrift*. The index to the journal of that name (published in nearby Stuttgart) reveals nothing under his name or on the topic in question.

[33] C.J.A. Mittermaier, „Beiträge zu der Lehre von Ehrenkränkung und Verleumdung" ("Contributions to the theory of defamation and slander") (1862) 6 Gerichtszeitung für das Königreich Sachsen 349, 354; see also (1863) 14 Allgemeine österreichische Gerichts-Zeitung 73, 74.

[34] A. Wach, „Legislative Technik" in K. von Birkmeyer *et al.* (eds), *Vergleichende Darstellung des deutschen und ausländischen Strafrechts: Vorarbeiten zur deutschen Strafrechtsreform* (*A Comparative Illustration of German and International Criminal Law: Preliminary work on German Criminal Law Reform*) (Otto Liebmann 1908),

the very moderate use of this technique in German criminal law, it may confidently be said, cannot be traced back to Macaulay.

The materials and debates on the German criminal codes of the nineteenth century are voluminous, and even if a full search for some evidence of Macaulay were possible, it would probably never be found. However, further strong circumstantial evidence of the lack of influence of the Indian Penal Code on Germany is provided by the second article mentioned in opening, that of Professor Gustav Radbruch. Radbruch had written widely on, and was an expert in, the history of the criminal law, and had moreover taken a leading role in the efforts to reform the German Criminal Code in the early 1920s. Published in 1937,[35] the article nowhere suggests that there had been any Indian influence on Germany. Rather, it reads like a report of a re-discovery of something long unknown. Radbruch would almost certainly have mentioned any such influence expressly, had he known of it.[36]

Radbruch is best known, in the English-language world today, for his post-War piece, "Five Minutes of Legal Philosophy",[37] setting out propositions of natural law theory; in Germany, the "Radbruch formula" is applied to this very day to determine whether statutes infringe the rules of natural law and are accordingly invalid.[38] Radbruch was both a professor at Heidelberg and a politician, having become, in the 1920s, Social Democrat Minister of Justice. Although he was not Jewish, his political background led to his dismissal as a professor by the Nazis within a few months of their takeover.

Being only fifty-four years old when dismissed, he did not turn his back on scholarship. He was fortunate enough to receive an

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vol. AT IV, 37-45. The extent to which the Indian Penal Code was referred to in the whole work may be judged by the index, which contains several dozen references to it outside Wach's chapter – although, almost always, the references are to individual provisions rather than overall style. A striking example of them is in vol. BT V, 128, fn.2, where even Macaulay's notes are referred to. A modern assessment of Wach's work may be found in D. Matthies, *Exemplifikationen und Regelbeispiele: eine Untersuchung zum 100-jährigen Beitrag von Adolf Wach zur „legislativen Technik"* (*Illustrations and examples of aggravating factors: a survey for the 100th anniversary of Adolf Wach's article on "legislative technique"*) (de Gruyter 2009), 108-132. On the place of the fifteen-volume work in German criminal law history, see K.-D. Godau-Schüttke, „Die gescheiterten Reformen des Straf- und Strafprozeßrechts in der Weimarer Republik" ("The failed reforms of criminal law and procedure in the Weimar Republic") [1999] Juristische Rundschau 55.

35 G. Radbruch, „Das indische Strafgesetzbuch" ("The Indian Penal Code") (1937) 51 Schweizerische Zeitschrift für Strafrecht 142.

36 The author has raised this with Prof. Thomas Vormbaum, the leading historian of criminal law in Germany, who agrees with this assessment.

37 Reprinted in, for example, J. Feinberg, H. Groß, *Philosophy of Law* (3rd edn, Wadsworth 1980), 109 ff.

38 G. Taylor, "Retrospective Criminal Punishment under the German and Australian Constitutions" (2000) 23 University of New South Wales Law Journal 196, 214.

invitation, immediately after his dismissal, to join the editorial board of the *Swiss Journal of Criminal Law*, and in 1935-36 enjoyed a year at University College, Oxford.[39] It was that same journal that published his piece on the Indian Penal Code – the German journals then being closed to him[40] – and it was doubtless during his year at Oxford that he came to know the Indian Penal Code. A footnote in his article refers to his indebtedness to one Sir Benjamin Lindsay, an Ulsterman who held a variety of judicial or quasi-judicial posts in India from 1894 to 1928 before becoming reader in Indian Law at the University of Oxford from 1930 to 1936.[41] Thus Radbruch's general statements about the success of the Code – it "has so well passed all the tests of practice, that even today, after almost a century, it remains in force and in esteem"[42] – may be regarded as first-hand hearsay supplied by a most well-informed source.

In addition to looking at the Code itself, Radbruch provides a brief biography of Macaulay, noting especially that "his maiden speech dealt with the removal of such legal disabilities as still applied to the Jews".[43] Radbruch also spends much time on the illustrations, and calls Macaulay's decision to make them "nothing law which would not be law without them"[44] "characteristic of the tendency of English legal thought and of English thinking as a whole never to seal up definitively all possible escape routes".[45] His discussion shows that he had understood the purpose of the illustrations more fully than Mittermaier.

Radbruch reserves special praise for Macaulay's provisions on consent, especially to medical operations, and private defence. Radbruch also shows that he was aware of the difference between the Macaulay Code of 1834 and the Peacock revision of 1860 by praising the former's provision about selection of offences in cases of doubt (cl. 61) over the latter's (s.72).[46] He praises also the sober provisions

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39 G. Radbruch, *Der innere Weg: Aufriß meines Lebens* (*The inner path: outline of my life*) (originally published 1951, Vandenhoeck & Ruprecht 1961), 137; A. Kaufmann, *Gustav Radbruch: Rechtsdenker, Philosoph, Sozialdemokrat* (Piper 1987), 138.

40 Kaufmann (n.39), 137 – with the unexplained exception of the *Archiv für Rechts- und Sozialphilosophie*.

41 Lindsay died on September 2, 1939 – the day after Germany invaded Poland, and that before Britain declared war on her. There was therefore little space in the newspapers to record his life and deeds; but they may be found summarised in J.F. Riddick, *Who Was Who in British India* (Greenwood 1998), 216. That source in turn seems to be based on *The Times* (London, September 5, 1939), 11.

42 Radbruch, „Das indische Strafgesetzbuch" (n.35), 142.

43 *ibid.*, 143.

44 From Macaulay's letter to the Governor-General, published with the Indian Penal Code: *A Penal Code prepared by the Indian Law Commissioners* (Bengal Military Orphan Press 1837), 7.

45 Radbruch, „Das indische Strafgesetzbuch" (n.35), 147.

46 *ibid.*, 147-149.

on abortion, which he sees as free from prejudice[47] – this was a major theme in Germany between the wars, because of the influence of feminism and the nascent study of human sexuality under men such as Magnus Hirschfeld. Radbruch concludes:

> "Of the particular circumstances of the Asian country in which it applies there is little to be seen in [the Code]. But it has proved itself over a long period of application. In view of such a fact, perhaps one might put a modest question mark next to the doctrine of the nationalist determination of all law? Must we not, with Sir James Fitzjames Stephen, recognise 'that the commonalities between men are greater than their differences'? And with Leopold von Ranke must we not recognise 'how important it is that a properly developed law is made free of particularity which might hinder its application to other nations, as happened with Roman law'?"[48]

Whatever the precise merits of the opening proposition – one which may also reflect the view of Sir Benjamin Lindsay – Macaulay's Code and its history certainly do show that at least some parts of the criminal law, as one more recent scholar has put it, are "(or should be) in substance ***universal***, so that the adoption of similar penal codes by different peoples is only natural".[49]

In its time and place, however, the passage quoted has a more obvious target. It is an obvious shot at the Nazis, one of whose ambitions was to replace the German Civil Code, in particular, by a code that would be less imbued with Roman notions and more German. It shows, too, that Radbruch would hardly have been averse to recording or even guessing at any influence of the Indian Penal Code on German law. But there was nothing to say.

III. WHY?

An American writer ignorant (one assumes) of Radbruch's assessment just quoted has, in essence, agreed with it: in Professor Kadish's view, Macaulay's "instances of deference [to Indian views and customs] were marginal and did not greatly affect the overall structure of the Code; they represented the kind of accommodation to local conditions that sound local government of the times saw as

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47 *ibid.*, 151.

48 *ibid.*, 151 ff. The quotation from Sir J.F. Stephen is merely re-translated into English here, with no attempt made to find the original. Radbruch does not cite his source.

49 L. Sebba, "The Creation and Evolution of Criminal Law in Colonial and Post-colonial Societies" (1999) 3 Crime, History and Societies 71, 86 (emphasis in original).

transitionally necessary".[50] This only raises the question more acutely why such a wonderful resource has not been better used.

No doubt some felt that the Indian Code was not suitable for export. Sir Rupert Cross suggests that Macaulay's Code could not have succeeded in England as there was no desire there, in contradistinction to India, to throw the existing law overboard. In other words, Macaulay was actually an innovative legislator, an office uncalled for in countries where mere codification was all that was desired. There is certainly a lot in this view. However, the point is somewhat contradicted by the assertion that, while Macaulay's language bore "about as much resemblance to the contemporary English statutory jargon as Urdu", to quote the perhaps unfortunate comparison of Sir Rupert Cross, Macaulay's Code was in essence "an improved version of the English law of the 1830s".[51] While the Code was certainly a great improvement linguistically, his Code is still recognisably an outgrowth of English legal thought.

An improved version of the English law of the 1830s would have fitted the bill admirably in many other places – in the 1830s. Another reason for the general neglect of the Code is, no doubt, that by its enactment in 1860 it was already twenty-two years old, and, in the following year, was to be overtaken by the series of English consolidations which formed the basis of much of Australian legislation in the 1860s and beyond – they were taken as the model by New South Wales in the 1870s. The simple lapse of time between drafting and enactment meant that the Code was already "behind the eight ball" when enacted. This was especially so in England, where a renewed effort at codification under Sir J.F. Stephen in the late 1870s, over forty years after the Macaulay Code had first appeared, had the local consolidating enactments of the 1860s ready to hand. The effort was unsuccessful in England, but it formed the basis of the Codes of Canada and New Zealand[52] – without any Macaulian input. There is also the practical problem that a copy of the Code might not have been widely available in most jurisdictions: in New South Wales, Holt's unsuccessful proposal was to make a special printing of it from what was probably the only copy in the colony at that time.

The Code's age when it was enacted may also be a part of the explanation for the keenness of the Colonial Office to eliminate the

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[50] S.H. Kadish, "Codifiers of the Criminal Law: Wechsler's Predecessors" (1978) 78 Columbia Law Review 1098, 1111.

[51] Cross (n.1), 523. On Macaulay's excellent English style, see M.L. Friedland, "Codification in the Commonwealth: Earlier Efforts" (1990) 2 Criminal Law Forum 145, 147.

[52] D.H. Brown, *Genesis of the Canadian Criminal Code of 1892* (University of Toronto Press, 1989); S. White, "Making of the New Zealand *Criminal Code Act* 1893: A Sketch" (1986) 16 Victoria University of Wellington Law Review 353.

Indian Penal Code from the African colonies in the 1920s. Professor Friedland wondered whether this might be due additionally to "a bias by the white population, shared by the Colonial Office, in favour of an 'English' code".[53] There is at least one record of a settler community in east Africa protesting that one should not place "white men under laws intended for a coloured population despotically governed",[54] although the Colonial Office did not take such objections seriously, and they were likely the product of ignorance. Had the protesters been informed of the identity of the drafter of the Indian Penal Code, some of their concern might have dissipated.[55] However, if we do not assume that for which we have no evidence – namely, that these people were bigots and fools – it may be that their concern was not so much with the colour of the skin of the drafter, but rather with the degree of political freedom permitted to the subjects of any proposed code. There were also a number of topics – the avoidance of religious strife, for example – which were pressing in India, but hardly so in east Africa. These settlers had no desire to be "despotically governed" or to have solutions for non-problems thrust upon them, which might have restricted their freedom of speech. Again it should also not be forgotten that Griffith C.J.'s Code was sixty years younger than Macaulay's, and that fact alone made the Griffith Code more attractive to those with a slightly higher level of knowledge on the topic.

But in fact that merely shifts the question. Why did Griffith C.J. not stoop to borrowing at least something from his illustrious predecessor in the role of codifier? In addition to the question of its age by the time he started his own work, another commentator suggests that "perhaps he himself wanted to rise to the level of fame of those codifiers of the past, so famous in the world of the common law, without taking advantage of their efforts".[56]

In Germany it was probably felt – to the extent that the Macaulay-cum-Peacock Code reached that country after its enactment – that it was an interesting curiosity, but scarcely suitable for imitation. Nevertheless, Germans too could have learnt much from it. The lack of a full-scale general part containing definitions of intention and negligence, for example, may make the Indian Penal Code appear somewhat unelaborated nowadays, but it is scarcely behind the rather terse

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53 M.L. Friedland, "R.S. Wright's Model Criminal Code: A Forgotten Chapter in the History of the Criminal Law" (1981) 1 Oxford Journal of Legal Studies 307, 339.

54 H.F. Morris, "A History of the Adoption of Codes of Criminal Law and Procedure in British Colonial Africa, 1876-1935" [1974] Journal of African Law 6, 13.

55 Friedland, "Codification in the Commonwealth" (n.51), 157.

56 A. Cadoppi (tr. K.A. Cullinane J.), "The Zanardelli Code and Codification in the Countries of the Common Law" (2000) 7 James Cook University Law Review 116, 138.

German Criminal Code of 1871 in this respect.[57] If anything, Macaulay is ahead of the Germans in some fields: he takes more trouble and shows considerably more insight in areas such as self-defence.

Even the modern German Criminal Code, like the Prussian code of 1851, contains no definition of intention.[58] Nor, admittedly, does Macaulay, but some of his provisions show an extraordinarily sophisticated delineation between intention, foresight and knowledge, as applied to various elements of criminal offences, which are a good substitute for a formal definition section;[59] and some of the topics he does deal with in his general sections, such as presumed consent in cases in which a person is unable to give consent,[60] remain, to this day, uncodified defences in Germany. There was much in Macaulay's Code from which an attentive German in the 1860s might have learnt, and there is even today some material from which Germans might still profit.

It is also worthy of note that one of the best-informed and earliest commentators on the Indian Penal Code was moved to remark, "The framers of the Code do not seem to have troubled themselves much about the rival theories of punishment, respecting which German jurists and philosophers have written so copiously".[61] But, by pointing out that a variety of purposes were pursued by the various punishments in the Code, our commentator also indicates that adherents of all schools would have found something for themselves in it. That commentator also points out that the Indian Penal Code contained no defence of withdrawal from attempt[62] – but that is scarcely enough to condemn it to the outer darkness.

However, the Indian Penal Code, for all its merits, was a somewhat out-of-the-way source for Germans, surrounded as they were by a rich home-grown and local European crop of codes and academic commentary on them. Furthermore, the Indian Penal Code was not always even readily accessible to them in either English or German (the first translation into German appears to be that of 1954).[63] Whether or not one had easy access to the text of the Indian Penal Code in a language one understood, however, one further characteristic of that Code might have militated against its adoption in all jurisdictions: Macaulay's clear language and use of illustrations.

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57 *Cf.* S. Yeo, B. Wright, "Revitalising Macaulay's Indian Penal Code" in Chan, Wright, Yeo (eds) (n.1), 10-13.

58 G. Taylor, "Concepts of Intention in German Criminal Law" (2004) 24 Oxford Journal of Legal Studies 99, 101.

59 Clause 182 of the draft of 1837; s.188 of the Indian Penal Code of 1860.

60 Section 92 of the present Indian Penal Code.

61 W. Stokes, *Anglo-Indian Codes* (Clarendon 1887), Vol. I, 26.

62 *ibid.*, 67.

63 G. Dahm, *Das indische (pakistanische) Strafgesetzbuch* (De Gruyter 1954).

Today, these features of his Code are seen as striking, ahead of their time and innovatory: only since 1987 has s.15AD of Australia's *Acts Interpretation Act* 1901 provided for examples to be given in statutes. It has recently been amended and now states that "the example may extend the operation of the provision". But examples were not an accepted drafting technique in the nineteenth century. This is seen in Professor Mittermaier's dislike of the illustrations (*ante*). Likewise, the English codification commissioners rejected them on the grounds (which now seem rather specious) that they were either redundant, if the drafting was clear enough, or, if not, a sign that it was defective and required clarification.[64] Innovative drafting techniques were not in favour in other areas of the law either in the nineteenth century. Thus, when a bankruptcy Bill was received by the Commons from the Lords in 1849 with each clause prefaced by a rationale for its enactment, the rationales were removed.[65]

The illustrations lend a certain air of naivety to the Code which did not appeal to the contemporary European mind: no code has appears to have ever followed suit. That impression is not dispelled by the clear, natural English of the Code to which Sir Rupert Cross drew our attention earlier: the language of the Code must have seemed somewhat *infra dig.*[66] to those used to more pompous statutory language. Mr Justice Lyttleton Bayley of Bombay drew the attention of the public of New South Wales with approval to the absence of the "technical jargon of English criminal law"[67] from Macaulay's Code; for many at the time he wrote, such facility of expression would have made the Code seem inferior rather than superior.

Now, of course, Mr Justice Bayley's view reminds us that the people of the nineteenth century were no more of one mind on all issues than are we today. Nor were they any more liable to indulge in shallow thought than we are. But they did draw distinctions that are, at least, out of fashion today, and the illustrations and linguistic style of the Code make it appear to be (as it indeed was) intended for a simple state of society, one in which criminal law had often to be practised by those with little training in it, and read by persons whose literacy was limited.[68] For the Establishment, these features were a

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[64] K.J.M. Smith, "Macaulay's 'Utilitarian' Indian Penal Code: An Illustration of the Accidental Function of Time, Place and Personalities in Law Making" in W.M. Gordon, T.D. Fergus (eds), *Legal History in the Making: Proceedings of the Ninth British Legal History Conference, Glasgow 1989* (Hambledon 1991), 155, fn.50.

[65] V.M. Lester, *Victorian Insolvency: Bankruptcy, Imprisonment for Debt and Company Winding-Up in Nineteenth-Century England* (Clarendon 1995), 69.

[66] Beneath their dignity.

[67] Bailey (n.11).

[68] *Cf.* B. Wright, "Criminal Law Codification and Imperial Projects: the Self-Governing Jurisdiction Codes of the 1890s" (2008) 12 Legal History 19, 25.

sign that the Code was not suited for use by more sophisticated or, as might have been said at the time, civilised societies. They made it too easy to dismiss the Code with a glance, and by attracting the attention of the reader they obscured the many remarkable insights in it. In this respect, Macaulay was his own worst enemy.

MUTUAL ASSISTANCE IN CRIMINAL MATTERS: THE CHALLENGES OF THE COMMON LAW TRADITION

SHANNON CUTHBERTSON[*]

ABSTRACT

The fundamental basis of mutual assistance in criminal matters is reciprocity. However, the capacity to extend reciprocity in providing assistance under the mutual assistance regime depends to a large extent on the legal traditions and criminal justice frameworks in requested countries. There are significant conceptual differences underpinning the criminal justice systems and international crime cooperation frameworks in civil code jurisdictions and common law jurisdictions. These conceptual differences are manifested in various respects, including the circumstances in which evidence will be admissible in prosecution or asset recovery proceedings. One of the greatest challenges facing Australia, as a jurisdiction which maintains the common law tradition, is securing evidential material from foreign countries in a form which complies with Australia's evidentiary requirements. This is a challenge shared by other common law jurisdictions and which recent Australian legislation has sought to address. The extent to which this legislation has the potential to achieve this objective is the subject of this article.

I. INTRODUCTION

As the scope and dimensions of transnational organised crime have continued to expand over the past decade,[1] the importance of effective international crime cooperation has increasingly been recognised, both at the law enforcement level and the prosecutorial

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[1] See, for example, Australian Crime Commission, "Organised Crime in Australia 2011" <http://www.crimecommission.gov.au/sites/default/files/files/OCA/2011/oca2011.pdf> accessed May 19, 2012; Parliamentary Joint Committee on the Australian Crime Commission, "Inquiry into the future impact of serious and organised crime on Australian society" (September 2007) <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=acc_ctte/completed_inquiries/2004-07/organised_crime/report/index.htm> accessed May 19, 2012; Australian Institute of Criminology, "The Worldwide Fight against Transnational Organised Crime: Australia" (2004) <http://www.aic.gov.au/documents/B/C/9/%7BBC9C69A2-1A88-48C1-948A-7C1EAAD4E251%7Dtbp009.pdf> accessed May 19, 2012.

level.[2] At the law enforcement level, policing agencies have been extending their intelligence-sharing activities, both operational and strategic,[3] as well as engaging in more joint operations across different jurisdictions. At the prosecutorial level, the successful prosecution of serious criminal activity with international aspects is often dependent upon securing critical evidential material located in another country. This is frequently the case in matters involving drug trafficking, terrorism, large-scale fraud (in particular tax fraud), and associated money laundering activities, as well as cybercrime in all its manifestations. Generally speaking, the only mechanism by which this can be achieved is through the regime for mutual assistance in criminal matters.[4]

This regime facilitates the obtaining of information and evidence located in foreign jurisdictions for the purposes of domestic investigations and prosecutions, and the provision of information and evidence to other countries for the purposes of their domestic investigations and proceedings. In addition, it facilitates the identification, location, restraint and confiscation of the proceeds of crime, wherever occurring.

Evidential material commonly sought by Australia pursuant to mutual assistance requests includes foreign business records such as bank records, corporate regulatory records, company business records, telecommunications and internet service provider records, internet content provider records, travel movement records and criminal records. Securing evidential material of this nature is the focus of this article.

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2 Indeed, in 1999-2000, Australia received 149 incoming requests for assistance under the mutual assistance regime, and issued 61 such requests; in 2009-2010, it received 380 incoming requests, and issued 182: Shannon Cuthberston, "Mutual assistance in criminal matters: cyberworld realities" in Saskia Hufnagel, Clive Harfield, Simon Bronitt (eds), *Cross-Border Law Enforcement, Regional Law Enforcement Cooperation – European, Australian and Asia-Pacific Perspectives* (Routledge 2012), 127.

3 Through organisations such as Europol, the European law enforcement agency located in The Hague (see https://www.europol.europa.eu/), as well as police liaison officer networks. As at May 1, 2011, the Australian Federal Police (AFP) had 31 police liaison officer posts in 30 countries. AFP Liaison Officers represent Australia's law enforcement interests overseas through collaboration with foreign law enforcement agencies, intelligence-gathering and capacity building. For further information about the AFP's Liaison Officer network, see: AFP, "International Liaison" <http://www.afp.gov.au/policing/international-liaison.aspx#InternationalContext> accessed March 20, 2012.

4 Cooperation through police channels may in some circumstances facilitate provision of evidentiary material, and in fact may in some circumstances represent the only effective means of obtaining relevant evidence. However, if evidentiary material is obtained through such channels, the likelihood of obtaining it in a form that will be admissible in court proceedings in Australia will be limited.

One of the most significant challenges Australia has faced in its mutual assistance practice is in attempting to secure foreign evidence, and in particular foreign business records, in a form which complies with Australia's requirements for the admissibility of evidence in criminal proceedings. Those requirements are often not readily understood or accepted by foreign authorities responsible for the execution of mutual assistance requests made by Australia. This article discusses the issues confronting mutual assistance practitioners in engaging with counterparts in foreign jurisdictions with different legal traditions.

The article commences with a general discussion of the nature of Australia's mutual assistance arrangements. The second section of the article compares the different approaches of common law and civil code jurisdictions to the making and execution of mutual assistance requests. A discussion of Australia's legislative regime governing the admissibility of foreign evidence follows. Australia's admissibility requirements are then compared with the approach adopted in England. The later sections of the article focus on proposed amendments to Australia's legislative regime, the reaction to those proposed amendments by the Australian legal fraternity and the nature of the amendments which were ultimately passed by the Australian Parliament. The article concludes with a discussion of the potential for a broader perspective on the exchange of evidentiary material under the mutual assistance regime.

II. BACKGROUND – FOUNDATIONS OF THE MUTUAL ASSISTANCE PROCESS

The fundamental basis of mutual assistance in criminal matters is reciprocity, as is the case for other forms of international crime cooperation, whether at the formal government-to-government level (*e.g.* extradition) or at the police-to-police level (*e.g.* Europol, police liaison officer networks). Countries assist each other on the understanding that they will receive reciprocal assistance as required, whether on the basis of a treaty or otherwise. However, a country's ability to reciprocate in providing assistance to other countries under the mutual assistance regime will to a large extent depend on its own legal traditions and criminal justice frameworks.

Under the *Mutual Assistance in Criminal Matters Act* 1987 ("*Mutual Assistance Act*"), Australia may provide assistance to any country, subject to the grounds for refusal of requests set out in section 8. A treaty arrangement is not required as a basis for the provision of

assistance under the *Mutual Assistance Act*.[5] However, Australia currently has 29 bilateral mutual assistance treaties.

Many of Australia's bilateral mutual assistance treaties date back to the time the *Mutual Assistance Act* entered into force. At that time, the treaty negotiation process was the cornerstone of Australia's mutual assistance regime.[6] The earlier treaties were instrumental in facilitating mutual assistance cooperation with our treaty partners from the time the treaties were negotiated. Similarly, treaties negotiated more recently have contributed to the development of a mutual assistance relationship with some countries where no effective relationship existed previously.

Some countries require a treaty as a basis for mutual assistance cooperation with other countries.[7] Other countries may not necessarily require a treaty, but are only prepared to provide limited assistance in the absence of a treaty obligation. Existing treaties are of considerable assistance in resolving issues arising in mutual assistance practice, whether the other country would provide assistance without a treaty or not, in that they cover matters such as the costs of executing requests, use of material obtained pursuant to requests and sharing of confiscated assets. This resolves in advance some of the issues that may arise with *ad hoc* assistance.

Mutual assistance obligations also exist under the major crime conventions, namely, the *United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances* 1988, the *United Nations*

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5 For example, it may take place under the Harare Scheme for Mutual Assistance in Criminal Matters within the Commonwealth. In other cases, it will be facilitated through less formal bilateral relationships with non-treaty countries, based on the principle of reciprocity – *i.e.* on the understanding that they will receive similar assistance in return, if requested: see Commonwealth Director of Public Prosecutions, "International Work", <http://www.cdpp.gov.au/Practice/International.aspx> accessed accessed March 20, 2012. Evidence obtained in accordance with formal mutual assistance requests falls under the *Foreign Evidence Act* 1994: see n.10, *post*, and Part IV, *post*. Evidence acquired by other means may only be admitted if obtained in accordance with the evidentiary requirements of relevant State or Territory legislation.

6 In the Second Reading Speech for the Mutual Assistance in Criminal Matters Bill 1987, the then Attorney-General stated:

> "At the seventh United Nations Crime Congress in Milan in 1985 Australia was instrumental in proposing, and having unanimously carried, a resolution calling for greater international cooperation in combating organised crime and urging all governments to give urgent attention to *the development of mutual assistance arrangements*." [Emphasis added.]

(Commonwealth of Australia, *Parliamentary Debates*, House of Representatives, April 30, 1987, p.2318). The reference to "mutual assistance arrangements" in this speech was a reference to bilateral mutual assistance agreements.

7 In some countries (such as Brazil), provision of assistance under the mutual assistance regime is entirely governed by bilateral mutual assistance treaties (as opposed to a legislative framework). Bilateral mutual legal assistance treaties are also of primary significance in the mutual assistance practice of the United States.

Convention against Transnational Organised Crime 2000 and the *United Nations Convention against Corruption* 2003. In circumstances where Australia does not have a bilateral treaty with a country from which assistance is sought, but the alleged criminal conduct falls within the parameters of one of these Conventions, Australia would rely on the relevant Convention as a basis for the request. Requests made under a multilateral treaty would generally take the same form as requests under a bilateral treaty, although they would more commonly be transmitted through the diplomatic channel rather than directly between central authorities.

Only six of Australia's bilateral treaty partners are common law jurisdictions (Canada, Hong Kong, India, Malaysia, the United States, and England and Wales, Scotland and Northern Ireland). Australia's other bilateral treaty partners are essentially civil code jurisdictions, including Austria, France, Italy, the Netherlands and Switzerland.

There are fundamental conceptual differences underpinning the criminal justice systems and international crime cooperation frameworks in civil code jurisdictions and common law jurisdictions. These differences are evinced in various respects, including the circumstances in which evidence will be admissible in a criminal prosecution or in asset recovery proceedings.[8]

III. Obtaining Evidence from Foreign Jurisdictions

A. Circumstances in which a mutual assistance request is required

The types of assistance sought under the mutual assistance regime often involve the exercise of coercive powers, such as production orders, compulsory taking of evidence, search warrants and the restraint and forfeiture of the proceeds of crime.

At the international level, it has generally been accepted that coercive measures raise issues of state sovereignty and accordingly should be the subject of official government oversight. A mutual assistance request will therefore be required where the assistance sought would involve the exercise of coercive powers.

Access to bank records, company business records, telecommunications records and internet service provider records will usually require some form of coercive process.[9] Access to corporate

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[8] See further Part III.A., *post*.

[9] Although Japan, for example, is able to obtain bank records on behalf of foreign countries without necessarily having recourse to coercive measures: personal communication with representative of Japan at the meeting of the 4th Round Expert Group B of the FATF (Financial Action Task Force) Working Group on Evaluations and Implementation (Vienna, Austria, May 7, 2010). See also, in relation to tax matters, Organisation for Economic Cooperation and Development, *Improving Access to Bank Information for Tax Purposes* (OECD 2000), 94: "even in ordinary tax

regulatory records, travel movement records and criminal records is often facilitated without recourse to coercive processes, as such records are held by government agencies.

Nonetheless, a mutual assistance request will generally be necessary where evidential material is required in a form which will be admissible in court proceedings.[10] This circumstance will be of particular concern to common law jurisdictions and is the primary focus of this article.

Most other common law jurisdictions face similar challenges to those Australia has faced in securing foreign evidence in a form that complies with evidentiary requirements under domestic law. These challenges arise largely from the different perspectives of civil code jurisdictions, whose evidentiary requirements in criminal proceedings are much less strict than those generally applicable in common law systems. Accordingly, there is often limited understanding and acceptance by civil code jurisdictions of requests from common law jurisdictions for evidence to be provided in compliance with strict evidentiary requirements.[11]

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examination requests, the banks are usually cooperative". In circumstances where the law enforcement authorities of the foreign country in which the required records are located are engaged in a joint investigation with Australian authorities, they may be able to obtain the records under their domestic processes and provide them to the Australian authorities without recourse to the mutual assistance process. However, if the records are sought by Australian authorities for prosecution purposes in a form that complies with our evidentiary requirements, a mutual assistance request is likely to be required in any event: see n.10, *post*.

[10] This will always be the case where outgoing requests by Australia seek evidence in a form which complies with the requirements of the *Foreign Evidence Act* 1994 (discussed in Part IV, *post*), as that legislation only applies to evidentiary material "obtained as a result of a request made to a foreign country by or on behalf of the Attorney-General": s.26, *Foreign Evidence Act* 1994. Evidence legislation in some Australian jurisdictions makes alternative provision for the admissibility of business records such as foreign corporate regulatory records and foreign criminal records, in a more simplified form than the requirements of the *Foreign Evidence Act* 1994. Accordingly, there may be some potential for such records to be obtained outside the formal mutual assistance process (through police channels), depending upon the particular foreign jurisdiction from which the records are sought.

[11] A detailed analysis of why such distinctions exist is outside the scope of this article. For an overview of the challenges arising in this context, see *United States v. Yang* (2001) 203 DLR (4th) 337, [24]-[27]. See also Geoff Gilbert, *Transnational Fugitive Offenders in International Law* (Martinus Nijhoff Publishers 1998), 127-137. There is a body of theoretical literature on the subject. In short, the distinction is theorised as due largely to differences in the decision making process of common law and civilian criminal trials, and, in particular, the extent to which the decision is made by professional lawyers or lay juries: see J.F. Nijboer, "Common Law Tradition in Evidence Scholarship Observed from a Continental Perspective" (1993) 41(2) American Journal of Comparative Law 299, 318-9. In common law systems, the inadmissibility of evidence results in the exclusion of evidence from the trial altogether, and the form and source of the evidence is key. In the latter, the

A recent study conducted by Ghent University established that information or evidence obtained by one E.U. member state would in most cases constitute admissible evidence under the law of the requesting member state where it had been collected in the requested state in accordance with that state's domestic law and procedures, or was otherwise available there, being eligible for use as evidence under the domestic law of the requested state.[12]

For instance, in the Netherlands, there are no specific criminal procedural requirements for evidence obtained in a foreign jurisdiction. Judges in criminal proceedings have a significant discretion in determining whether evidence is admissible or not.[13] In respect of foreign evidence, Dutch judges proceed on the basis of the principle of mutual trust, and respect the *locus regit actum*: even if a certain method of evidence-gathering is not permissible in the Netherlands, if it is permitted under the law of the requested country, the evidence obtained thereby may also be admissible in the Netherlands.[14]

Similarly, in Switzerland, there are no specific evidentiary requirements of the nature of those imposed under Australian law. Article 10 of the Swiss *Criminal Procedure Code* provides that the court shall be free to interpret the evidence in accordance with the views that it forms over the entire proceedings.[15] Further, Article 141(3) of the Code provides that evidence that has been obtained in violation of administrative regulations is admissible.

Australia and other common law jurisdictions such as Canada, Hong Kong and New Zealand commonly request that foreign evidence be provided under cover of some form of affidavit or equivalent testimony. On the other hand, English and Welsh Courts are able to accept foreign evidentiary material accompanied by statements, as opposed to evidence on oath or affirmation.[16]

The approach of the United States is rather different from other common law jurisdictions in so far as their bilateral mutual legal

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question tends to be whether the judicial decision on guilt can be properly founded on the evidence: *ibid.*, 314. For a leading analysis of the theoretical distinctions between civilian and common law systems, see Mirjan Damaška, "Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study" (1973) 121(3) University of Pennsylvania Law Review 506.

12 Gert Vermeulen, Wendy De Bondt and Yasmin Van Damme, *E.U. cross-border gathering and use of evidence in criminal matters* (Maklu 2010), 138, <https://biblio.ugent.be/publication/884961> accessed March 20, 2012.

13 J. Koers, *Nederland als verzoekende staat bij wederzijdsse rechtshulp in strafzaken: achtergronden, grenzen en mogelijkheden* ("The Netherlands as requesting state in mutual legal assistance in criminal matters: background, limits and possibilities", Wolf Legal Publishers 2001) 537.

14 *ibid.*, 480.

15 Swiss Criminal Procedure Code, <http://www.admin.ch/ch/e/rs/c312_0.html> accessed March 20, 2012.

16 See further Part IV, *post*.

assistance treaties specifically make provision for foreign evidence to be certified or authenticated in accordance with forms annexed to the treaties. The relevant treaty provisions provide that documents certified or authenticated in accordance with the relevant forms shall be admissible in evidence in the courts of the United States as proof of the truth of the matters set forth therein.[17] Bilateral mutual legal assistance treaties entered into by the United States have the force of law in that jurisdiction.[18] Because the evidentiary requirements of the United States are set out in their bilateral treaties, the United States generally does not face the difficulties other common law jurisdictions continue to face in securing foreign evidence which complies with domestic evidentiary requirements.

B. Evidentiary requirements – challenges for the reception of foreign evidence in common law jurisdictions

The purpose of the mutual assistance process will potentially be undermined if foreign evidence is received by Australia in response to a mutual assistance request in a form that is not admissible in Australian courts.

From the perspective of civil code jurisdictions, many of which are important mutual assistance partners for Australia, Australia's evidentiary requirements are complex and onerous.

Investigating or examining magistrates, or prosecutors, responsible for the execution of Australia's requests for assistance in civil code jurisdictions, are accustomed to relatively minimal evidentiary requirements in criminal justice processes in their own countries. It is difficult for them to accept the necessity to provide evidential material in the form required by Australian authorities. They do not readily understand the purpose and significance of Australia's procedural requirements and are inclined to regard those requirements as mere "formalities." They consider themselves justifiably concerned at the imposition of resource-intensive procedural requirements which they are not required to fulfil for the purposes of criminal proceedings in their own jurisdictions. From their perspective, it should be sufficient that requested evidential material is obtained in the course of the execution of a mutual

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[17] The Treaty between the Government of Australia and the Government of the United States of America on Mutual Assistance in Criminal Matters annexes three forms described as a "Certificate of Authenticity of Business Records", an "Attestation of Authenticity of Foreign Public Documents" and an "Attestation with Respect to Seized Articles", respectively. The Treaty is scheduled to the *Mutual Assistance in Criminal Matters (United States of America) Regulations* 1999, <http://www.comlaw.gov.au/Details/F1999B00145> accessed March 20, 2012.

[18] Admissibility of foreign business records obtained under cover of a "foreign certification" is provided for in 18 *United States Code* §3505.

assistance request in accordance with the law of the requested country and provided to the Australian authorities through official government channels.

Many civil code jurisdictions conduct investigations (and execute mutual assistance requests) in the form of a *procès-verbal*.[19] Australia has often been provided with the entire file of the *procès-verbal* in response to a mutual assistance request. However, such a file would not generally contain any testimony which would be admissible in Australian court proceedings. It is difficult for our foreign mutual assistance partners to understand that such a file is an insufficient response to the execution of a mutual assistance request from Australia's perspective.

Further, Australia has often encountered situations where employees of foreign businesses which produce records in response to an Australian request refuse to make an affidavit in respect of those records, or alternatively, refuse to affirm specific matters set out in the *pro forma* affidavit provided by Australia. This is a situation which is not necessarily limited to employees of businesses in civil code jurisdictions.

IV. Development of the Australian Approach to the Admissibility of Foreign Business Records since 1994

As has been indicated, Australia's mutual assistance requests commonly seek assistance in obtaining bank records, corporate regulatory records, company business records, telecommunications and internet content provider records, travel movement records and criminal records. Generally, such records are sought under cover of testimony[20] in compliance with the provisions of the *Foreign Evidence Act* 1994[21] of the Commonwealth of Australia.

A. Foreign Evidence Act 1994

The *Foreign Evidence Act* 1994 came into force in October, 1994.[22] In the second reading speech for the *Foreign Evidence Bill* 1993, the then parliamentary secretary to the Attorney-General, Peter Duncan, stated as follows in explaining the purposes of the bill:

> "Implementation of [Part 3] will improve the effectiveness of [arrangements for] mutual assistance in criminal matters …

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19 A form of report of an investigation containing directions and orders by the responsible prosecutor or investigating magistrate, as well as evidential material collated in the course of the investigation and related correspondence.

20 The requirements for testimony under the *Foreign Evidence Act* 1994, s.22, are set out in Pt IV(A), *post*.

21 Pt 3, <http://www.comlaw.gov.au/Details/C2010C00380> accessed March 20, 2012.

22 The *Foreign Evidence Act* was amended in 2010 (see further Part IV.D., *post*).

> and thereby assist in complex prosecutions involving foreign evidence. A resolution passed by the National Complex White Collar Crime Conference in Melbourne in June 1992 called for action to overcome such deficiencies. Part 3 meets the concerns expressed in the resolution, whilst continuing to protect the legitimate rights of the accused."[23]

The *Foreign Evidence Act* applies to criminal proceedings in courts of the states and territories of Australia by virtue of regulations made under the Act.[24] Part 3 of the *Foreign Evidence Act* provides for the admissibility of "foreign material" in criminal and related civil proceedings. Pursuant to section 21, Part 3 applies to:

> "testimony, and any exhibit annexed to such testimony, obtained as a result of a request made by or on behalf of the Attorney-General to a foreign country for the testimony of a person, and any exhibit annexed to such testimony, to be made available."

The requirements for testimony for the purposes of the *Foreign Evidence Act* are set out in section 22 as follows:

> "*Requirements for testimony*
> **22.**-(1) The testimony must have been taken:
> (a) on oath or affirmation; or
> (aa) under an obligation to tell the truth imposed, whether expressly or by implication, by or under a law of the foreign country concerned;[25] or
> (b) under such caution or admonition as would be accepted, by courts in the foreign country concerned, for the purposes of giving testimony in proceedings before those courts.
> (2) The testimony must purport to be signed or certified by a judge, magistrate or officer in or of the foreign country to which the request was made."

Foreign material which complies with the requirements of the Act may be adduced in criminal and related civil proceedings, subject to certain exceptions specified in section 24 of the Act, and a wide discretion in the court to decline to admit the evidence under section 25.

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[23] Commonwealth of Australia, *Parliamentary Debates,* House of Representatives, March 2, 1994, p.1660

[24] See section 20(2) of the *Foreign Evidence Act* 1994 (n.21) and the *Foreign Evidence (Foreign Material – Criminal and Related Civil Proceedings) Regulations* 1994 <http://www.comlaw.gov.au/Details/F2004C00425> accessed March 20, 2012.

[25] Inserted by the *Foreign Evidence Amendment Act* 2010 <http://www.comlaw.gov.au/Details/C2010A00055> accessed March 20, 2012.

B. The practical application of Australia's foreign evidence legislation

Throughout the history of the existence of the mutual assistance regime in Australia (the *Mutual Assistance Act* came into force in 1988), including since the enactment of the *Foreign Evidence Act*, Australia has had significant difficulties in obtaining evidence from foreign countries which complies with its evidentiary requirements.[26] All of Australia's requests to foreign countries for assistance set out in detail the requirements for admissibility of requested evidentiary material in Australian courts, as well as providing *pro forma* affidavits, declarations or statements as appropriate. However, commonly, material received in response to a request is not provided in compliance with these requirements. In some cases, depending on the timeframe for relevant prosecution proceedings and the importance of the evidence to the prosecution case, the foreign material is returned to the requested country with a request that it provide the material under cover of certified testimony. Even then, it cannot necessarily be anticipated that the material, when it is returned to Australia, will be fully compliant with Australia's admissibility requirements.

The prospects of obtaining foreign evidential material in admissible form for the purposes of Australian proceedings may be enhanced by direct assistance from Australian case officers who attend in the relevant foreign jurisdiction to assist with the execution of a mutual assistance request. However, there are clearly significant resource implications associated with travel by Australian law enforcement officers to foreign jurisdictions to assist with the execution of requests and the ability to facilitate such travel will be subject to budgetary constraints and priorities in the relevant Australian law enforcement agency.[27]

C. Foreign Evidence Amendment Bill 2008

On December 3, 2008, the Attorney-General of Australia introduced the *Foreign Evidence Amendment Bill* 2008 into the House of Representatives of the Australian Parliament. The primary purpose of the bill as stated in the explanatory memorandum was:

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[26] The Hon. Robert McClelland M.P., Attorney-General, *House Hansard* (Australia), Parl. 42, 12298 (December 3, 2008). See also Attorney-General's Department, *Submission from the Attorney-General's Department*, 1, [5], available at <https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=04507a4c-995d-4586-a66a-77c2f1a4e014> accessed March 20, 2012.

[27] Australia's diplomats overseas generally have a relatively limited understanding of mutual assistance, investigative and criminal justice processes and of Australia's evidentiary requirements. They also carry significant workloads in terms of their duties as officers of Australia's Department of Foreign Affairs, and have limited time to spend dealing with mutual assistance requests, beyond transmitting them and following up on progress in their execution.

> " to amend Part 3 of the *Foreign Evidence Act* to streamline the process for adducing foreign material that appears to consist of a business record. The bill would provide that foreign material that appears to consist of a business record may be adduced unless the court considers the business record is not reliable, probative, or is privileged."[28]

The term "business record" was defined as follows:

> "*business record* means a document that:
>
> (a) is or forms part of the records belonging to or kept by a person, body or organisation in the course of, or for the purposes of, a business; or
>
> (b) at any time was or formed part of such a record".[29]

The term "business" was defined by reference to the dictionary in the *Evidence Act* 1995 (Cth),[30] namely:

> "*References to businesses*
>
> **1.**-(1) A reference in this Act to a business includes a reference to the following:
>
> (a) a profession, calling, occupation, trade or undertaking;
>
> (b) an activity engaged in or carried on by the Crown in any of its capacities;
>
> (c) an activity engaged in or carried on by the government of a foreign country;
>
> (d) an activity engaged in or carried on by a person holding office or exercising power under or because of the Constitution, an Australian law or a law of a foreign country, being an activity engaged in or carried on in the performance of the functions of the office or in the exercise of the power (otherwise than in a private capacity);
>
> (e) the proceedings of an Australian Parliament, a House of an Australian Parliament, a Committee of such a House or a Committee of an Australian Parliament;
>
> (f) the proceedings of a legislature of a foreign country, including a House or Committee (however described) of such a legislature.

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[28] <http://www.comlaw.gov.au/Details/C2008B00277/Explanatory%20Memorandum/Text> accessed March 20, 2012.

[29] Item 2 of Schedule 1 to the *Foreign Evidence Amendment Bill* 2008 <http://www.comlaw.gov.au/Details/C2008B00277/> accessed March 20, 2012.

[30] Specifically, "a meaning affected by clause 1 of Part 2 of the Dictionary in the *Evidence Act* 1995": *ibid.*, Sched.1, Pt 1, para.1. It has become standard legislative drafting practice in Australia to have a Dictionary at the end of a piece of legislation rather than an interpretation provision at the beginning of an Act.

> (2) A reference in this Act to a business also includes a reference to:
>
> (a) a business that is not engaged in or carried on for profit; or
>
> (b) a business engaged in or carried on outside Australia."[31]

The essential effect of the proposed amendments would have been that a court determining the admissibility of foreign business records obtained in accordance with the requirements of the *Foreign Evidence Act* 1994 would not have been required to consider whether the form of the evidence complied with other rules of evidence under federal or state or territorial law.[32]

Such rules include the rule against hearsay.[33] Australian evidence legislation generally contains an exception to the hearsay rule in respect of business records, provided that certain matters going to the provenance of the business records can be established. These matters are matters which are generally dealt with in *pro forma* affidavits annexed to Australia's mutual assistance requests. The purpose of the inclusion of these matters in the *pro forma* affidavits is not clearly understood by authorities in civil code jurisdictions and foreign affiants are not necessarily prepared to attest to any or all of these matters.

The explanatory memorandum to the 2008 bill included the following explanation of the proposed business records amendments:

> "Business records are generally considered an accurate and reliable form of evidence. However, the current provisions are not always adequate to meet the special evidentiary problems associated with obtaining and using evidence in Australian proceedings which has been obtained from foreign countries with differing systems of criminal investigation and procedural law. This amendment would ensure that foreign material that appears to consist of a business record need not comply with the admissibility requirements of the relevant Australian jurisdiction hearing the proceedings but rather can be adduced provided the records are reliable and probative and are not privileged."[34]

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31 Item 1 of Schedule 1 to the *Foreign Evidence Amendment Bill* 2008 and clause 1 of Part 2 of the Dictionary in the *Evidence Act* 1995 (Cth).

32 Australia has six States and two self-governing Territories. While there has been a move towards the development of uniform evidence legislation across the states and territories of Australia over the past 15 years, different evidentiary rules continue to apply across the various jurisdictions.

33 The rule that evidence of prior representations purporting to assert the existence of a fact is not admissible as evidence of that fact.

34 n.28.

The amending provisions also expanded the concept of "testimony" in section 22 of the *Foreign Evidence Act* 1994 to include evidence given under an obligation to tell the truth imposed, whether expressly or by implication, by or under a law of the requested foreign country. The stated purpose of this amendment[35] was to recognise that some civil code jurisdictions do not require evidence to be taken under oath, affirmation or caution as those concepts are understood in common law jurisdictions, but under some other form of obligation to tell the truth. The amendment was intended to facilitate the admissibility of evidence taken in accordance with procedures under a foreign country's legal system even though such procedures may diverge from Australian evidentiary requirements.

The amending provisions further included a provision creating a presumption that the requirements for testimony in section 22 of the 1994 Act had been complied with, unless evidence sufficient to raise doubt about this was adduced to the contrary. A court would, however, have retained its general discretion to direct that foreign evidence not be adduced.[36]

On February 12, 2009, the *Foreign Evidence Amendment Bill* 2008 was referred to the Standing Committee on Legal and Constitutional Affairs of the Australian Senate for inquiry and report. The committee received eight submissions on the bill.

The Law Council of Australia[37] opposed the Bill. In evidence given before the standing committee on February 20, 2009, their representative described the proposed amendments as "potentially dangerous".[38] In its submission to the committee, the Law Council expressed concern that the procedure which would be introduced by the Bill "departs from established principles of evidence law" and "places the burden on the party against whom the records are tendered to resist admissibility".[39] In addition to concerns about a departure from established exceptions to the hearsay rule, the Law

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35 See *ibid.*

36 Sections 25 and 25A of the *Foreign Evidence Act* 1994.

37 The Law Council is the principal representative body of the Australian legal profession and represents about 56,000 legal practitioners nationwide: <http://www.lawcouncil.asn.au/> accessed March 20, 2012.

38 Senate Standing Committee on Legal and Constitutional Affairs, Committee Hansard, *Reference: Foreign Evidence Amendment Bill 2008*, February 20, 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommbill%2F11749%2F0001%22> accessed March 20, 2012.

39 Law Council of Australia, *Submission to the Senate Committee on Legal and Constitutional Affairs on the Foreign Evidence Amendment Bill 2008*, February 19, 2009, <https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=af1d8cb5-65d7-43da-95a1-fb7149a0493d> accessed March 20, 2012. For other submissions, see <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/foreign_evidence/submissions.htm> accessed March 20, 2012.

Council also referred to other principles of evidence law, including principles relating to opinion evidence,[40] tendency evidence,[41] identification evidence,[42] exclusion of admissions[43] and unlawfully or improperly obtained evidence.[44]

As stated above, the *Foreign Evidence Amendment Bill* 2008 was essentially directed at facilitating the admissibility of foreign *business records* (obtained in response to a formal mutual assistance request[45]). The types of foreign business records sought and obtained under the mutual assistance regime are most commonly bank records, but may also comprise telecommunications records, corporate regulatory records, travel movement records, land title records and criminal records. It is difficult to envisage circumstances in which the principles of evidence law referred to by the Law Council (with the exception of the hearsay rule) would be applicable in relation to records of this nature which have been obtained in a foreign country by government authorities in that country in accordance with the law of that country in response to a formal request made under the mutual assistance regime.[46]

The Law Council's position on the proposed amendments was summarised as follows-

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[40] Pursuant to section 76 of the Commonwealth *Evidence Act* 1995, evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed.

[41] The tendency rule limits the admissibility of evidence going to the character, reputation or conduct of a person, or a tendency that a person has or had, as proof that a person has a tendency to act in a particular way, or to have a particular state of mind: see sections 97 and 101 of the *Evidence Act* 1995.

[42] Visual identification evidence (based on what a person saw) and picture identification evidence (identification made by a person examining pictures kept for the use of police officers) is subject to admissibility limitations depending on the circumstances in which the identification was conducted: see sections 114 and 115 of the *Evidence Act* 1995.

[43] Evidence of an admission is not admissible if the admission was influenced by violent, oppressive, inhuman or degrading conduct or was made in circumstances which are otherwise likely to have adversely affected the truth of the admission, or where it would otherwise be unfair to the defendant to use the admission evidence: see sections 84, 85 and 90 of the *Evidence Act* 1995.

[44] Pursuant to section 138 of the *Evidence Act* 1995, evidence that was obtained improperly or in contravention of an Australian law, or in consequence of an impropriety or of a contravention of an Australian law, is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence obtained in the way the evidence was obtained.

[45] Part 3 of the *Foreign Evidence Act* applies solely to foreign material obtained as a result of a request made to a foreign country by or on behalf of the Attorney-General: s. 21.

[46] Evidence that has been obtained otherwise than in accordance with a formal mutual assistance request does not fall under the *Foreign Evidence Act*; such evidence would not be admissible under Australian law unless it complied with applicable evidentiary requirements in relevant State or Territory legislation.

> "However, the complexities and practical inconveniences arising from the collection of foreign business records and the delay this may cause for criminal proceedings in Australia do not justify the introduction of a regime that departs from the principles that have been developed in Australian [*sic*.] to deal with the use of business records as evidence."[47]

The Law Council also referred to "the possibility of receiving evidence from a witness overseas using audio-visual technology".

At the more extreme end of the spectrum, David McLeod, who had represented David Hicks,[48] an Australian Guantanamo Bay detainee, expressed "great concern" about the bill and what he saw as a reversal of the onus of proof of the reliability of foreign business records. His submission included the following assertion:

> "If the bill is passed, the Australian law in this respect would be as bad as the discredited and offensive rules for prosecuting detainees at the Guantanamo Bay and the bill might well become known as the '*Guantanamo Bay Amendment*'."[49]

McLeod's comments, while clearly sensationalist, convey a fundamental concern with the perceived reversal of the burden of proof that the 2008 bill would have introduced, and in this respect, accord with those of the Law Council. It is, however, open to question whether the position adopted by the Law Council takes sufficient account of the realities of international cooperation in criminal matters, particularly in the context of cooperation between common law jurisdictions and civil code jurisdictions. As regards the possibility of arranging for evidence to be given via video link, experience indicates that it is highly unlikely that employees of a foreign bank or other business would be prepared to give oral evidence via video link (or otherwise) in relation to records produced by the relevant bank or business. Furthermore, some countries do not have a legislative framework in place that governs the giving of

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47 Law Council of Australia (n.39), 12.

48 David Hicks was charged with offences by the US Military Commission and was detained at the US Naval Station Guantanamo Bay in Cuba. He pleaded guilty in 2007 to providing material support for terrorism and was sentenced to seven years' imprisonment. Pursuant to a pre-trial agreement, his sentence was reduced to nine months' imprisonment. After sentencing, he was transferred to Australia to serve the remainder of his sentence. Mr McLeod is a partner with Lempriere Abbott McLeod, Barristers & Solicitors, of Adelaide, South Australia. He acted for Mr Hicks in proceedings in Australia as well as in relation to the proceedings before the US Military Commission.

49 David McLeod, Submission to the Inquiry by the Senate Standing Committee on Legal and Constitutional Affairs into the Foreign Evidence Amendment Bill 2008, February 19, 2009, <https://senate.aph.gov.au/submissions/comittees/viewdocument.aspx?id=e9698d1c-5515-4660-83b5-b7d6ea969e9a> accessed March 20, 2012.

evidence in foreign proceedings via video link, including provision for witnesses to be summoned to give evidence in this way.[50] Some countries currently do not even permit arrangements to be made on a voluntary basis for their citizens to give evidence via video link in foreign criminal proceedings.[51] Other countries do not have the capacity to facilitate video link arrangements. In these circumstances, the "possibility of receiving evidence from a witness overseas using audio-visual technology" may well be limited, if not non-existent.[52]

The Senate standing committee reported on the bill in March, 2009. The majority[53] ultimately recommended that the Senate pass the bill, subject to amendments being made to clarify that the party seeking to adduce foreign business records is required to satisfy the court that the foreign business records meet the evidentiary requirements of the *Foreign Evidence Act* 1994. The committee's conclusion on the bill as a whole was:

> "The Committee acknowledges the valid concerns of the legal representatives participating in this inquiry but is conscious that a pragmatic approach is required in the circumstances. While the Committee has some reservations about the bill, it concludes that the bill contains safeguards, which while not identical to current Australian laws, should achieve the same objectives."[54]

However, in respect of concerns raised about reversal of the onus of proof of the admissibility of foreign business records (based upon the presumption that evidentiary requirements had been met in respect of

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[50] Singapore has allowed the giving of evidence via video link on an *ad-hoc* basis – for example, in the trial of Silviu Ionescu in Romania. This was mentioned in argument by the defence in a recent Singaporean case, *Kim Gwang Seok v. Public Prosecutor* [2012] SGHC 51, [15(k)]. By way of contrast, in Kim Gwang Seok's case, the High Court denied the defendant's request to admit evidence from witnesses via video link from abroad: the Singaporean *Criminal Procedure Code* 1985 (the relevant code for this case, but since replaced by the 2010 Code) provides only for persons in Singapore to give evidence via video link. This decision is under appeal.

[51] Some civil code jurisdictions will not allow any direct liaison between foreign law enforcement authorities and their citizens. In Switzerland, a provision of their Criminal Code (Art. 271) creates an offence (punishable by up to three years' imprisonment) where a person, without authorisation, takes actions in Switzerland on behalf of a foreign State which are matters for the Swiss authorities.

[52] Even where a foreign country is willing and able to cooperate with Australia in facilitating the giving of evidence via video link, there exists the practical challenge arising from the significant time differences between Australia and other countries. For an overview of Australian case law on the challenges posed by the reception of evidence via video link, see *ASIC v. Rich* [2004] NSWSC 467, [19]-[43].

[53] There were dissenting comments from several committee members.

[54] Senate Standing Committee on Legal and Constitutional Affairs, *Foreign Evidence Amendment Bill* 2008, March 2009, p. 20, <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate_Committees?url=legcon_ctte/foreign_evidence/report/index.htm> accessed March 20, 2012.

testimony accompanying foreign business records),[55] the committee concluded that the party seeking to adduce the foreign evidence should bear the onus of satisfying the court that the foreign business records meet the required evidentiary standard.

D. Foreign Evidence Amendment Act 2010

Following the Senate committee's report, the Australian government moved amendments to the bill. Their stated purpose[56] was to displace the operation of the rule against hearsay with respect to foreign business records, whilst maintaining the applicability of other evidentiary rules in the relevant Australian jurisdiction where the foreign evidence is sought to be adduced.

The amendments also:

- included a provision to enable the court to draw inferences from the form and contents of foreign material for the purpose of determining whether the material is a business record; and
- removed the provision of the bill which would have created a presumption that foreign material complied with the requirements for foreign testimony in section 22 of the 1994 Act.

These amendments have now passed into law in the *Foreign Evidence Amendment Act* 2010, which came into force on June 4, 2010. The amendments apply to criminal proceedings for offences against the law of the Commonwealth of Australia, to related civil proceedings, and to proceedings under a proceeds of crime law.[57] The amendments only apply to proceedings in a court of a state or territory of Australia if the state or territory has been specified in regulations made under the Act.[58] Regulations have been made under the Act applying the amendments to the states of Western Australia, South Australia and Tasmania, and to the Northern Territory.[59] It is not yet clear whether the states of New South Wales, Victoria and Queensland wish to pursue application of the amended provisions to

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[55] The Bill would have amended section 22 of the *Foreign Evidence Act* 1994 to include a new section 22(3) in the following terms:

> "(3) It is presumed (unless evidence sufficient to raise doubt is adduced to the contrary) that the testimony complies with subsections (1) and (2)."

[56] Supplementary Explanatory Memorandum to the *Foreign Evidence Amendment Bill* 2008.

[57] Section 20(1) of the *Foreign Evidence Act* 1994. A "related civil proceeding", for the purposes of the Act, means any civil proceeding arising from the same subject matter from which a criminal proceeding arose (and includes a proceeding under the *Customs Act* 1901 (Cth) or a proceeding for the recovery of tax, or of any duty, levy or charge, payable to the Commonwealth): section 3 of the Act.

[58] Section 20(2) of the *Foreign Evidence Act* 1994.

[59] *Foreign Evidence (Application of Amendments) Regulations* 2011.

criminal proceedings in respect of offences under the law of those states. In view of the fact that New South Wales and Victoria generate most of the work undertaken on behalf of the states in Australia's mutual assistance practice, the position of these states has the potential to undermine significantly the efficacy of the amendments.

The amended legislation was considered by Johnson J. in the Supreme Court of New South Wales in *R. (Cth) v. Milne (No. 1)*.[60]

Mr Milne made a number of applications to the New South Wales Supreme Court in advance of his trial on charges of tax fraud and associated money laundering offences.[61] The Commonwealth Director of Public Prosecutions had obtained evidence from foreign jurisdictions under the mutual assistance regime for the purposes of the prosecution of Mr Milne. Johnson J. considered the amended provisions of the *Foreign Evidence Act* and concluded that:

> "foreign business records obtained as a result of a request under the *Mutual Assistance in Criminal Matters Act* 1987 (Cth) should, generally, be admitted under Part 3 of the *Foreign Evidence Act* 1994 (Cth) without the attendance of overseas witnesses to give oral evidence and without satisfying the requirements for the exception to the hearsay rule in [section 69 of the] *Evidence Act* 1995."[62]

However, in reaching his conclusion that the foreign evidence was admissible (and should not be excluded in the exercise of his discretion), his Honour took into account the fact that the prosecution were proposing to call Mr Milne's former lawyer[63] as a witness, to give evidence with respect to transactions and events to which many of the foreign business records related.

Milne is the only case to date to have considered the amending legislation. While confirming the effect of the amending legislation, it does so in circumstances where there was a witness who could give evidence of the circumstances in which the foreign business records were produced. It is not clear to what extent the availability of the relevant witness was a determinative factor in the court's conclusions on the admissibility of the foreign evidence, or what a court's approach might be in circumstances where there is no such witness. If, in the absence of a witness available in Australia to give direct evidence about relevant business transactions, the presiding judge would not necessarily be inclined to admit the evidence under the amended provisions of the new Act – a question which *Milne* leaves open – then the amending provisions will not have achieved the

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60 [2010] NSWSC 932.

61 Being offences against the law of the Commonwealth of Australia.

62 *Milne* (n.60), [264].

63 Mr Milne had sought tax law advice from a partner in a Sydney law firm in 2004.

intended effect. It is therefore, as yet, difficult to assess the potential impact of the amendments to the *Foreign Evidence Act*.

V. CURRENT OUTLOOK

The *Foreign Evidence Amendment Act* 2010 goes some way towards addressing longstanding concerns about obtaining admissible evidence under the mutual assistance regime. However, as outlined above, the amendments contained in that legislation are limited in their scope and reflect a compromise position adopted by the Australian government following considerable opposition to the initial proposed amendments after their introduction into Parliament.

The amended legislation will be of some assistance where foreign testimony has been obtained concerning particular business records but where the testimony does not address all of the requirements for an exception to the hearsay rule under the applicable Australian evidence law to be made out. However, the amendments do not obviate the need to continue to seek evidentiary material from foreign countries under cover of some form of certified testimony.

Many members of the legal fraternity in Australia may consider the current regime under the *Foreign Evidence Act* to constitute the lowest acceptable threshold for the admissibility of foreign evidence in Australian court proceedings. Many would no doubt echo the comments of the chair of the Senate Standing Committee on Legal and Constitutional Affairs during the committee hearing on February 20, 2009:

> "If you are now saying to us that one of the reasons why the rules of admissibility of evidence need to be tossed out or overridden is because many foreign countries are unwilling or sometimes unable to provide the necessary documentation, why should we come down to the lowest common denominator? Why are we changing our laws simply because we cannot get documents that other countries are able to provide for us, when we maintain a very high standard of prosecution and a very high standard of protection for witnesses?"[64]

However, law enforcement officers, prosecutors and government practitioners in the field of international crime cooperation are inclined to a different perspective, borne of experience of the reality of liaison and cooperative efforts at the international level with

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[64] Senate Standing Committee on Legal and Constitutional Affairs, Committee Hansard, *Reference: Foreign Evidence Amendment Bill 2008*, February 20, 2009, <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Fcommbill%2F11749%2F0002%22> accessed March 20, 2012> accessed March 20, 2012.

foreign partner agencies. From their perspective, the following responses might be ventured to the questions raised by the committee's chair:

- to facilitate law enforcement efforts to combat serious transnational crime, including prosecutions that may otherwise not be viable;
- to recognise and accept the validity of criminal justice systems of significant mutual assistance partners that differ from Australia's own common law based system.

VI. The Approach in England and Wales

Recent liaison with other common law jurisdictions (Canada, Hong Kong and New Zealand) has revealed that they encounter similar difficulties with their mutual assistance processes. However, in England and Wales there is greater flexibility in evidentiary requirements than is the case in respect of Australian foreign evidence requirements, and English prosecutors and courts have been willing to adopt a relatively robust approach in determining the admissibility of foreign evidence. For instance, there have been cases in England in which foreign evidence has not been provided in the requested form, but prosecutors have argued the evidence should nonetheless be admitted on the basis that the court is entitled to draw certain inferences in relation to the evidence, for example, that relevant foreign business records were created in the course of the relevant foreign companies' business and that the creators of the records had personal knowledge of the information recorded.

A. The case law: Foxley

The 1995 English case of *R. v. Foxley*[65] involved corruption allegations against a former employee of the Ministry of Defence. Foxley was alleged to have accepted financial inducements to place contracts for the supply of ammunition with three foreign manufacturing companies and to have arranged for the proceeds of his corrupt activities to be paid into Swiss bank accounts through three other foreign entities in which he had a beneficial interest. The prosecution sought to rely on documentary evidence produced by the investigating officer, including documents such as credit notes and invoices obtained from the manufacturing companies in response to mutual assistance requests. The investigating officer gave evidence that the documents had been seized from the relevant companies by the appropriate authority in the requested country and transmitted by that authority to the Crown Prosecution Service. The defence

[65] [1995] 2 Cr.App.R. 523 (Court of Appeal).

objected on various grounds, including that no witness spoke to the documents nor to the transactions they reflected; there was no evidence from the creators of the documents as to the purpose for which they were created or that the makers had personal knowledge of the contents of the documents or that they were created in the course of a business; and it was not possible to cross-examine on the documents. The trial judge admitted the evidence and Foxley was convicted as charged.

On appeal, the Court of Appeal was required to consider whether relevant admissibility requirements set out in the *Criminal Justice Act* 1988 had been met. Section 24(1) of that Act[66] provided as follows:

> **"24.**-(1) Subject—
>
> (a) to subsections (3) and (4) below;
>
> (b) to paragraph 1A of Schedule 2 to the *Criminal Appeal Act* 1968; and
>
> (c) to section 69 of the *Police and Criminal Evidence Act* 1984,
>
> a statement in a document shall be admissible in criminal proceedings as evidence of any fact of which direct oral evidence would be admissible, if the following conditions are satisfied—
>
> (i) the document was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office; and
>
> (ii) the information contained in the document was supplied by a person (whether or not the maker of the statement) who had, or may reasonably be supposed to have had, personal knowledge of the matters dealt with."

The Court of Appeal held that the purpose of section 24 was "to enable the document to speak for itself"[67] and further that:

> "The documents had been produced by the appropriate authorities in Italy, Germany and Norway responding to letters of requests for assistance addressed to them by the prosecuting authorities in the United Kingdom and the court was entitled to infer that these documents had been obtained from the three manufacturing companies by the appropriate authorities acting within the laws of their respective countries."[68]

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66 Since replaced by the *Criminal Justice Act* 2003 (see *post*).

67 *Foxley* (n.65), 536G.

68 *ibid.*, 538A.

The court concluded that a court can infer that a document is authentic from its provenance (the nature of the document, its source and the method by which it has been brought before the court).

The reasoning in *R. v. Foxley* was followed in the English cases of *R. v. Ilyas and Knight*[69] and *Vehicle and Operator Services Agency v. George Jenkins Transport Limited*.[70]

B. Statute: The Criminal Justice Act 2003

The provisions of England and Wales' *Criminal Justice Act* 2003[71] relating to hearsay evidence provide for the admissibility of a "statement not made in oral evidence" in criminal proceedings.[72] The term "statement" is defined as "any representation of fact or opinion made by a person by whatever means".[73] Section 114(1) stipulates that hearsay is admissible only if, *inter alia*, a provision of Chapter 2 (ss.114-134) of Part 11 of the Act makes it admissible. By section 116, a hearsay statement is admissible, subject to specified conditions, if the person who made the statement "is outside the United Kingdom and it is not reasonably practicable to secure his attendance".[74] The provisions governing the admissibility of business records (domestic or foreign) are set out in section 117 of the 2003 Act. Subsections (1) and (2) read:

> "*Business and other documents*
> **117.**-(1) In criminal proceedings a statement contained in a document is admissible as evidence of any matter stated if—
> (a) oral evidence given in the proceedings would be admissible as evidence of that matter,
> (b) the requirements of subsection (2) are satisfied, and
> (c) the requirements of subsection (5) are satisfied, in a case where subsection (4) requires them to be.
> (2) The requirements of this subsection are satisfied if—
> (a) the document or the part containing the statement was created or received by a person in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office,
> (b) the person who supplied the information contained in the statement (the relevant person) had or may reasonably be supposed to have had personal knowledge of the matters dealt with, and
> (c) each person (if any) through whom the information was supplied from the relevant

69 [1996] Crim.L.R. 810 (Court of Appeal).
70 [2003] EWHC 2879, *The Times*, December 5, 2003.
71 <http://www.legislation.gov.uk/ukpga/2003/44/contents> accessed March 20, 2012.
72 *ibid.*, s.114.
73 *ibid.*, s.115(2).
74 *ibid.*, s.116(2)(c).

> person to the person mentioned in paragraph (a) received the information in the course of a trade, business, profession or other occupation, or as the holder of a paid or unpaid office."

In accordance with the provisions of the *Criminal Justice Act* 2003 identified above, mutual assistance requests made by the United Kingdom (for England and Wales) generally ask that statements (rather than affidavits or oral testimony) be obtained in relation to evidence sought from a foreign jurisdiction. The English and Welsh requirements are accordingly more flexible and less onerous from the perspective of requested civil code jurisdictions than Australia's requirements.

For instance, it would be possible for a law enforcement agency in the requested country to obtain a statement from a bank employee at the time that the requested bank records are obtained. However, if affidavit or similar evidence is required, this will involve an examining magistrate or prosecutor (or even a judge) in a civil code jurisdiction[75] making arrangements to witness the affidavit or otherwise take the evidence of the relevant bank employee. Such a process is clearly more resource-intensive than obtaining a statement.

On the other hand, the requirement in England and Wales for statements to be obtained in respect of business records, containing information such as that set out in section 117(2) of the *Criminal Justice Act* 2003, is a requirement that is foreign to civil code jurisdictions in the context of their domestic regimes. As a result, the situation which arose in *R. v. Foxley* is not uncommon. It then becomes a matter for the courts whether they are prepared to admit foreign business records despite the absence of any statement verifying the authenticity of those records.

VII. CONCLUSION – REFLECTIONS ON A "RADICAL" OPTION

Australia continues to face significant challenges to facilitate the efficient and successful conduct of mutual assistance casework with its partners. These principally arise as a result of Australia's relatively onerous evidentiary requirements. One option to facilitate admissibility of foreign evidence in Australia that could potentially address these challenges would be to amend the *Foreign Evidence Act* 1994 to provide that evidence obtained from a foreign country in response to a request made by or on behalf of the Attorney-General is admissible in court proceedings in Australia where it has been obtained in accordance with the law of the requested foreign country. An extension of this approach might contemplate a provision allowing a court to draw an inference that evidence has been obtained in accordance with the law of the relevant

[75] Or a person competent to witness affidavits in a common law jurisdiction.

foreign country where it has been obtained by an officer of the requested country and provided through official channels under the mutual assistance regime (as certified by the Attorney-General or his delegate).

Alternatively, an amending provision could require that foreign evidence be accompanied by a certificate signed by the officer of the relevant foreign country responsible for the execution of the request stating that the foreign business records were lawfully obtained and are in a form which would permit them to be admitted as evidence in criminal proceedings in that country.

The court would retain its discretion under section 25 of the *Foreign Evidence Act* 1994 to direct that foreign material not be adduced as evidence if it appears to the court's satisfaction that, having regard to the interests of the parties to the proceeding, justice would be better served if the foreign material were not adduced as evidence.

Such a proposal would no doubt be considered to be radical by a substantial sector of the Australian legal fraternity. However, it is by no means a radical approach from the perspective of European civil code jurisdictions. In fact, from that perspective it would be taken for granted.[76]

One issue which would be likely to be raised in the face of such a proposal would be that identified by the chair of the Senate Standing Committee on Legal and Constitutional Affairs during the Committee hearing on February 20, 2009, quoted above. The issue is the prospect of allowing evidence obtained from foreign countries to be admitted in criminal proceedings in Australian courts without the need to comply with evidentiary requirements applicable to evidence obtained within Australia. However, it is rare that prosecutors in Australia are put to strict proof of the source of business records, such as bank records, obtained in Australia. It is generally accepted that such records derive from the source from which they purport to derive. In these circumstances, it would appear difficult to sustain an argument that the implementation of any such proposal under the *Foreign Evidence Act* 1994 would remove necessary protections for defendants charged with serious offences.

An alternative objection that might be raised (which also follows, to some extent, from the comments of the Senate Committee chair) is that the focus should be on improving the efficacy of mutual assistance arrangements, rather than compromising our common law evidentiary principles. However, there are limits to the extent to which mutual assistance arrangements can be improved in the context of securing evidence in admissible form for Australian court proceedings, taking into account the divergence of common law and civil code systems and the comparatively resource-intensive nature of Australia's mutual assistance

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[76] See Part III.A., *ante*.

requests with their attendant evidentiary requirements.[77] For decades Australia has sought to address issues associated with our admissibility requirements, whether through detailed explanations in requests accompanied by *pro forma* affidavits, through the attendance of Australian investigating officers in requested countries to assist with the execution of our requests, through the assistance of Australia's foreign missions or more generally, by enhancing working relationships with our counterpart central authorities around the world. However, Australia has continued to face significant challenges in securing foreign evidence which complies with our admissibility requirements, as have other common law jurisdictions (with the exception of the United States[78]).

A compromise approach that could potentially be considered by Australia would be the approach in England and Wales, of seeking statements rather than testimony in the form of (or a form equivalent to) an affidavit. It should be noted however that law enforcement authorities in the United Kingdom have access to mechanisms not available to Australia to seek to ensure their mutual assistance requests are executed in accordance with their procedural requirements, such as Eurojust[79] and prosecutors (liaison magistrates) based in other E.U. Member States (as well as countries outside the E.U.).

Another approach which would be open to Australia to consider would be an approach similar to that adopted by the United States, that is, seeking foreign business records under cover of some form of certificate or attestation of authenticity. However, it is difficult to assess how successful such an approach by Australia would be in circumstances where there would not be any attendant treaty obligation to provide the requested foreign records in such a form (as there is under the United States' bilateral mutual legal assistance treaties).

In an era of increasingly wide-ranging and multi-faceted transnational crime, including cybercrime, committed across borders with increasing rapidity and ingenuity, perhaps it may be timely to reconsider the extent to which it is necessary or appropriate to continue to require full compliance with the strict evidentiary conventions of the common law tradition in the field of international crime cooperation.

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77 For a general discussion of some of the challenges presented by the mutual assistance process in the current law enforcement environment, see Cuthbertson (n.2).

78 See Part III.A., *ante*.

79 Eurojust is the EU's Judicial Cooperation Unit. It facilitates investigations and prosecutions across E.U. Member States. It is constituted by 27 National Members, one from each Member State. The National Members include judges, prosecutors and police officers. For further information, see: <http://www.eurojust.europa.eu/> accessed March 20, 2012.

THE FALLACY THAT IS INCAPACITATION: AN ARGUMENT FOR LIMITING IMPRISONMENT ONLY TO SEX AND VIOLENT OFFENDERS

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THEO ALEXANDER[†]

ABSTRACT

Incapacitation theory claims that because certain offenders pose a serious risk of further offending, imprisoning them will eliminate that risk for the duration of the imprisonment. It therefore punishes offenders for crimes that it is assumed or anticipated they will commit. The efficacy of sentencing to achieve the goal of incapacitation is challenged by empirical evidence relating to the capacity to predict which offenders will re-offend the by the high economic cost of imprisonment. This article makes four recommendations regarding the legitimacy of incapacitation as an objective sentencing and the circumstances in which imprisonment should be used as a sanction for crime: (i) the emphasis placed on incapacitation as a sentencing objective in general should be reduced; (ii) to the extent that incapacitation is pursued, it should incorporate restrictions other than imprisonment and including modern monitoring techniques; (iii) imprisonment should be confined to offenders who commit serious sexual and violence offences; and (iv) future research needs to examine more closely the life trajectories of victims of crime and offenders who have spent time in gaol, so that the principle of proportionality may be applied more precisely.

I. INTRODUCTION

Sentencing has a number of objectives. The main objectives include community protection, retribution, specific deterrence, general deterrence and rehabilitation.[1] These objectives are often in conflict and there are no settled principles regarding their relative importance.[2]

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[1] For a discussion of key sentencing principles, see: G. Mackenzie, N. Stobbs, *Principles of Sentencing* (Federation Press 2010); M. Bagaric, R. Edney, *Australian Sentencing* (Thomson Reuters 2011) [1-3910]-[1-42001].

[2] For example, the goal of rehabilitation is normally achieved by not imposing a custodial sanction, whereas specific deterrence and general deterrence often favour a harsh sanction, such as a lengthy term of imprisonment. Sentencing decisions are not governed by strict protocols but rather are discretionary. The methodology is termed the "instinctive synthesis," which enables sentencing judges to set a

Theoretically at least, these objectives are desirable. However, it is unclear whether, pragmatically, they are achievable. In the realm of sentencing, there is often a gap between legal doctrine, criminological theory, and evidence-based knowledge.

This article (like a number of others[3]) aims to bridge the gap between sentencing theory, evidence and practice. It focuses on the goal of incapacitation. The harshest penalty in all developed countries, except the United States and Japan, is imprisonment. This is widely regarded as the most effective means of protecting the community. Apart from capital punishment, no sanction can ever hope totally to prevent offenders from re-offending. Most sanctions involve a degree of supervision or interference with the freedom of the offender. Sanctions in the form of probation, licence cancellation, and community work orders curtail, at least to some extent (if merely by reducing the hours left in the day), the opportunity for further offending. Imprisonment is the sentencing option that most significantly curtails the liberty of the offender.

Even imprisonment, however, is not a guaranteed method for preventing crime. While in prison, offenders have the opportunity to damage property, assault other inmates and guards, buy and sell drugs, and so on. The offending behaviour is at least confined (geographically) to within the prison walls, and the likelihood of offences being committed is significantly reduced by the high level of scrutiny and control. Thus, while we can never be sure that imprisonment will totally prevent criminal behaviour, imprisonment renders offenders incapable of re-offending outside of prison – apart from when they direct or encourage criminal behaviour outside prison. This discussion focuses on imprisonment as the paradigm incapacitative sanction.

In short, we seek to answer the question: "Is imprisonment an effective means of protecting the community from crime?" The term "effective" is admittedly value-laden. As explained below, it is used in this article to incorporate both a normative and economic dimension.

The efficacy of imprisonment to attain the goal of incapacitation has been considered at reasonable length in the literature. There is a relatively settled body of knowledge questioning the effectiveness or desirability of incapacitation, mainly because there are no accurate techniques for distinguishing offenders who will reoffend from those

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penalty without stating how much weight is given any particular consideration (see *R. v. Williscroft* [1975] V.R. 292 (Supreme Court of Victoria); *Markarian v. R.* [2005] HCA 25, (2006) 228 C.L.R. 357; *Hili v. R.* [2010] HCA 45, (2010) 242 C.L.R. 520).

[3] See M. **Bagaric, T.** Alexander, "(Marginal) general deterrence doesn't work – and what it means for sentencing" (2011) 35 ***Criminal Law Journal*** 269; and M. Bagaric, T. Alexander, "The capacity of criminal sanctions to shape the behaviour of offenders: specific deterrence doesn't work, rehabilitation might and the implications for sentencing" (2012) Criminal Law Journal (forthcoming).

who will not.[4] This argument is often supplemented by economic conservatism that suggests the high cost of imprisonment often makes incapacitation undesirable.

This article builds on these sentiments. The conclusion that the goal of incapacitation is undesirable logically leads to the (second) question: should imprisonment *per se* be abolished?[5] This is especially so given that other sentencing objectives commonly advanced in support of imprisonment, in the form of general and specific deterrence, are also demonstrably false.[6]

Section four of this article focuses on this second question. It argues that, although several justifications for imprisonment are misconceived, imprisonment is still a desirable and necessary disposition in some cases. However, it is argued that imprisonment is currently greatly overused as a response to crime. There is a pressing need fundamentally to re-think how, and in what circumstances, imprisonment should be employed. It concludes with reasoned recommendations, and the qualifications and limitations thereto.

The proposed reforms are ambitious. They are not attainable in the short term – too much entrenched reflexive thinking and too much political capital are at stake to allow change to occur too readily. But there is some basis for believing that, ultimately, reason and empirical knowledge will overcome orthodoxy – and the failure and subsequent abolition of capital punishment in much of the common law world gives hope for such reforms.

This article focuses chiefly on principle and practice within Australia; however, the discussion and conclusions are transferrable to all jurisdictions with similar sentencing regimes, especially the United Kingdom.

II. The Relevance of Incapacitation to Sentencing Law and Practice

Community protection is the ultimate aim of sentencing and has been recognised as such in Australia for several decades. Brennan J. in *Channon v. R.*[7] stated:

> "The necessary and ultimate justification for criminal sanctions is the protection of society from conduct which the

[4] See, for example, Kris Gledhill, "Preventive Sentences and Orders: the Challenges of Due Process" [2011] J.C.C.L. 78.

[5] This question logically arises most acutely pursuant to a utilitarian theory of punishment. It also arises in the context of several reributive theories, though not the *lex talionis* theory ("an eye for an eye"). For a discussion of the various forms of retributive theories, see M. Bagaric, K. Amaresakara "The Errors of Retributivism" (2000) Melbourne University Law Review 125.

[6] See further Part III.A., *post.*

[7] [1978] FCA 16, (1978) 20 A.L.R. 1.

> law proscribes. … Criminal sanctions are purposive, and they are not inflicted judicially except for the purpose of protecting society; nor to an extent beyond what is necessary to achieve that purpose. … Courts have not infrequently attempted further analysis of the several aspects of punishment (*R. v. Goodrich* (1952) 70 W.N. (N.S.W.) 42, where retribution, deterrence and reformation are said to be its threefold purposes). In reality they are but the means employed by the courts for the attainment of the single purpose of the protection of society."[8]

The most effective (albeit not guaranteed) way of stopping offenders from re-offending is by sending them to prison. Most sentencing statutes in Australia refer to incapacitation as an objective of sentencing.[9] Incapacitation is particularly relevant to sentencing where there is a significant risk (real or perceived) of recidivism.[10]

In the United Kingdom, incapacitation is one of the rationales most evident on the face of the *Criminal Justice Act 2003* (U.K.).[11] In the United States, while incapacitation is generally not expressly invoked as a discrete sentencing objective, it is nonetheless the cornerstone and primary rationale[12] underlying the increasingly harsh sentencing regimes that have resulted in an explosion in the number of United States inmates.[13] For the first three-quarters of the last

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8 *ibid.*, 5 (emphasis added). See also *R. v. Valenti* (1980) 48 F.L.R. 416; *El Karhani v. R.* (1990) 21 N.S.W.L.R. 370 (N.S.W. Court of Criminal Appeal), 377.

9 For example, the *Sentencing Act* 1991 (Vic.), s.5(1)(e); *Penalties and Sentences Act* 1992 (Qld), s.9(1)(e); *Criminal Law (Sentencing) Act* (S.A.), s.10(i); *Sentencing Act* 1995 (N.T.), s.5(1)(e); and *Sentencing Act* 1997 (Tas.), s.3(b), (which stipulates community protection as the main purpose of sentencing). The term normally used is "protection of the community," rather than incapacitation, but since the other goals of sentencing, such as denunciation, deterrence, rehabilitation and just punishment (which, it is often said, are merely means to achieve community protection) are normally also expressly mentioned, it seems that in this context community protection means incapacitation.

10 *R. v. Brewster* [1997] EWCA Crim. 1609, (1980) 2 Cr.App.R.(S.) 191, 192.

11 See the *Criminal Justice Act* 2003 (U.K.), ss.225-228, which allow for the imposition of extended terms of imprisonment in relation to serious offences and specific sexual and violent offences where the offender presents a significant risk to members of the public. For a discussion of these provisions, see Andy Bickle, "The dangerous offender provisions of the *Criminal Justice Act* 2003 and their implications for psychiatric evidence in sentencing violent and sexual offenders" (2008) 19 Journal of Forensic Psychiatry and Psychology 603.

12 See the discussion in L. Stolzenberg and S.J. D'Alessio, "Three Strikes and You're Out: The Impact of California's New Mandatory Sentencing Law on Serious Crime Rates" (1997) 43(4) Crime and Delinquency 457; R. Henham, "Anglo-American Approaches to Cumulative Sentencing and Implications for U.K. Sentencing Policy" (1997) 36(3) Howard Law Journal 263, 270.

13 F.E. Zimring, G. Hawkins, *Incapacitation* (Oxford University Press 1995), 3, goes further: they claim that incapacitation is the "principal justification for imprisonment in American criminal justice".

century, the U.S. imprisoned about 110 persons per 100,000 of adult population;[14] the rate is now nearly 750 per 100,000 of adult population (the highest in the world) – which has produced a near doubling of the U.S. prison population in the past 20 years.[15]

In Australia, the rate of imprisonment has also approximately doubled in the past 25 years.[16] Currently, the imprisonment rate is 165 per 100,000 of adult population. However, this is by no means uniform. The highest rate of imprisonment is in the Northern Territory (719 prisoners per 100,000 adult population), followed by Western Australia (262). The lowest is the Australian Capital Territory (83).[17]

The rate of imprisonment in the United Kingdom is slightly less than in Australia, at around 150 per 100,000 population. The total number of U.K. prisoners in 2011 was slightly more than 88,000. The average prison population has increased by about 3.7 *per cent* each year over the past 25 years.[18]

III. DOES INCAPACITATION WORK?

Given that disabling offenders by confinement prevents them from causing further harm in the community, it may seem that enough has already been said to justify incapacitation. As Jeremy Bentham noted, "*for a body to act in a place* it must be there".[19] When imprisoned "for a given time: he will neither pick a pocket, nor break into a house, nor present a pistol to a passenger … within that

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14 A. Blumstein, "U.S. Criminal Justice Conundrum: Rising Prison Populations and Stable Crime Rates" (1998) 44(1) Crime and Delinquency 127, 129.

15 This reflects a near doubling in the past 20 years; see Bureau of Justice Statistics, *Correctional Population* <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm> accessed May 1, 2012.

16 This data is for the period 1984 to 2010: see *Australian crime: Facts & figures: 2011* (Australian Institute of Criminology 2012), ch. 6, "Corrections" <http://www.aic.gov.au/en/publications/current%20series/facts/1-20/2011/6_corrections.aspx> accessed May 1, 2012. The trend has not been linear: there have been significant fluctuations over this period.

17 See Australian Bureau of Statistics, *Corrective Services, Australia* (cat.no. 4512.0, March Quarter 2011), <http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/9A0865837AEBACA9CA2578AF0011B147/$File/45120_mar%202011.pdf> accessed March 1, 2012.

18 Social and General Statistics, *Prison Population Statistics*, 23 February 2012. Twenty eight *per cent* of prisoners were sentenced for violent offences. More wide ranging comparisons are found in this publication. Weekly population figures for the United Kingdom are updated at <http://www.justice.gov.uk/statistics/prisons-and-probation/prison-population-figures> accessed March 1, 2012.

19 J. Bentham, "Panopticon *versus* New South Wales", in J. Bowring (ed.), *The Works of Jeremy Bentham* (Russell and Russell, New York 1962), vol. 4, 173.

time".[20] While this may be so, the efficacy of incapacitation is not directly related to the height of the prison wall. It is necessary to look not only to the immediate and direct consequences, but also the indirect and connected consequences of a practice to assess its overall efficacy.

Viewed from this perspective, the picture becomes more complex. It may well be that incapacitation is pointless because the offenders who are being imprisoned would not have re-offended in any event. Moreover, there is the danger that incapacitation may lead to *more* crime due to the possibly brutalising experience of gaol – making it more likely offenders will commit serious offences when they are released. The deleterious effect of imprisonment on the inmate was recognised in the White Paper which formed the basis of the *Criminal Justice Act* 1991 (U.K.): "imprisonment provides many opportunities to learn criminal skills from other inmates".[21]

It follows then, that while the efficacy of incapacitation as an objective of sentencing can be assessed by reference to its ability to render an offender incapable of re-offending, this is a necessary, but not sufficient, requirement. Whether the ultimate goal of protecting the community can be achieved through incapacitation, as has been alluded to above, depends strongly on two main considerations. Firstly, what is the likelihood that an offender would have offended during the term of imprisonment if he or she was in the community instead of prison? Secondly, what is the possible corrupting effect of prison, to the extent that it may increase the propensity of offenders to commit offences when released? If offenders are more prone to commit offences when they come out of prison than before they went in, then any good arising from the physical prevention of offending during the term of imprisonment is actually offset by that increase.

A. Does imprisonment backfire by leading to more crime?

Many commentators have suggested that prisons harden offenders by concentrating maladaptive, socially destructive and rebellious attitudes, thereby leading to a greater inclination to commit crime. But this hypothesis is not supported by empirical data.

There have been a large number of studies looking at the impact of imprisonment on re-offending. Most of them have been undertaken in the context of measuring whether specific deterrence is

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[20] *ibid.*, 183. See also H.L. Packer, "Theories of Punishment and Correction: What is the Function of Prison?" in L. Orland (ed.) *Justice, Punishment, Treatment: The Correctional Process* (Free Press 1973), 183, 187: "so long as we keep a man in prison he will have no opportunity at all to commit certain kinds of crime".

[21] United Kingdom Home Office, *White Paper: Crime, Justice and Protecting the Public* (HMSO 1990), [3.2].

achievable. They also incidentally provide data regarding whether imprisonment increases re-offending.

In a recent analysis,[22] Don Weatherburn compared re-offending rates for people convicted of burglary and non-aggravated assault. The study compared 96 "matched pairs"[23] of burglars and 406 matched pairs of offenders convicted of non-aggravated assault. The study looked at offenders who were convicted in the years 2003 and 2004, and each matched pair was followed up for five years, or until he or she was convicted of another offence (whichever came first).[24]

The study noted that "prison exerts no significant effect on the risk of recidivism for burglary"[25] and "the effect of prison on those who were convicted of non-aggravated assault seems to have been to increase the risk of further offending."[26] However, this increase was only minor and not conclusive. The study found that:

> "There is no evidence that prison deters offenders convicted of burglary or non-aggravated assault. There is some evidence that prison increases the risk of offending amongst offenders convicted of non-aggravated assault but further research with larger samples is needed to confirm the results."[27]

This conclusion can only be tentative, because it relates to only two offence categories; however, it is consistent with the overwhelming trend of international research and literature reviews in this area.[28]

One of the most wide-ranging studies that has been conducted regarding the effectiveness of specific deterrence is a literature review by Gendreau, Goggin and Cullen[29] published in 1999 involving a review of 50 different studies, which related to a sample of 336,052 offenders – dating back to 1958 – which provided 325 comparisons. The study compared the recidivism rate of people who were

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22 D. Weatherburn, *The effect of prison on adult re-offending* (NSW Bureau of Crime Statistics and Research 2010), <http://www.lawlink.nsw.gov.au/lawlink/bocsar/ll_bocsar.nsf/vwFiles/cjb143.pdf/$file/cjb143.pdf> accessed March 1, 2012.

23 Matched pairs are individuals who share all relevant variables (such as the number of prior court appearances and bail status) except for the outcome that is being tested, *i.e.* the rate of recidivism.

24 Weatherburn (n.22),5.

25 *ibid.*, 10.

26 *ibid.*, 10.

27 *ibid.*, 1.

28 In the Australian context, the same conclusions have been reached in relation to juvenile offenders in the following reports: J. Kraus, "A comparison of corrective effects of probation and detention on male juvenile offenders" (1974) 49 British Journal of Criminology 49; D. Weatherburn, S. Vignaendra, A. McGrath, "The specific deterrent effect of custodial penalties on juvenile reoffending" (AIC Reports: Technical and Background Paper 33, Australian Institute of Criminology 2009).

29 Paul Gendreau, Claire Goggin, Francis Cullen, *The Effects of Prison Sentences on Recidivism* (Public Works and Government Services Canada, 1999), <http://www.prisonpolicy.org/scans/e199912.htm> accessed March 1, 2012.

sentenced to imprisonment as opposed to community service, and of those who were sentenced to longer and shorter terms of imprisonment.

The review established that recidivism rates for offenders who were sent to prison were similar to those who received a community-based sanction. Longer terms of imprisonment also did not reduce re-offending and, in fact, resulted in a very small increase in recidivism. The authors concluded:

> "The data in this study represents the only quantitative assessment of the relationship between time spent in prison and offender recidivism. The database consisted of 325 comparisons involving 336,052 offenders. On the basis of the results, we can put forth one conclusion with a good deal of confidence. None of the analysis conducted produced any evidence that prison sentences reduce recidivism. Indeed, combining the data from the more *vs.* less and incarceration *vs.* community groupings resulted in 4 *per cent* and 2 *per cent increases* in recidivism."[30]

This is confirmed by even more recent empirical analysis. Nagin, Cullen and Johnson[31] provide the latest extensive literature review regarding specific deterrence.[32] They reviewed separately the impact of custodial sanctions versus non-custodial sanctions, and the effect of the length of sentence on re-offending. The review examined six experimental studies where custodial *versus* non-custodial sentences were randomly assigned;[33] eleven studies which involved matched pairs;[34] 31 studies which were regression-based;[35] and seven other studies which did not neatly fit into any of those three categories, and included naturally occurring social experiments which allowed inferences to be drawn regarding the capacity of imprisonment to deter offenders.

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[30] *ibid.* The suggestion that some of the increased recidivism rate might be attributable to the possibility that offenders serving longer sentences are "career" criminals is debunked by more acute studies, involving controls such as matched pairs. The study by Daniel Nagin *et al.*, which is now discussed, is one such study.

[31] Daniel S. Nagin, F.T. Cullen, C.L. Johnson, "Imprisonment and Reoffending" (2009) 38 Crime and Justice 115, 145.

[32] The main studies are summarised in Weatherburn *et al.* (n.28), and in *Does Imprisonment Deter? A Review of the Evidence* (Sentencing Advisory Council 2011), <https://sentencingcouncil.vic.gov.au/sites/sentencingcouncil.vic.gov.au/files/does_imprisonment_deter_a_review_of_the_evidence.pdf> accessed March 1, 2012.

[33] Nagin *et al.* (n.31), 144-45.

[34] *ibid.*, 145-54.

[35] *ibid.*, 154-55. Regression analysis is used to understand the cause and effect relationship between variables, and is undertaken by analysing data where certain known variables are kept constant and then estimating the relationship between other variables. In the studies analysed by Nagin *et al.*, the variables that were kept constant normally included and age, sex, race, prior criminal history and offence type.

Nagin *et al.* concluded that imprisoned offenders do not exhibit a lower rate of recidivism than those who are not imprisoned. Some studies in fact show that the rate of recidivism is higher, suggesting a criminogenic effect of spending time in prison. Thus,

> "Taken as a whole, it is our judgment that the experimental studies point more toward a criminogenic rather than preventive effect of custodial sanctions. The evidence for this conclusion, however, is weak because it is based on only a small number of studies, and many of the point estimates are not statistically significant."[36]

Accordingly, the weight of evidence supports the view that subjecting offenders to harsh punishment, imprisonment in particular, is unlikely to increase the prospect that they will become law-abiding citizens in the future. Indeed, the studies suggest that sentencing offenders to imprisonment may marginally increase the chance of recidivism. However, to the extent that there may be criminogenic effects of imprisonment, they are minor, and the evidence leading to this conclusion is not definitive. Therefore, no policy or legal changes should be made on the basis of this claim – the evidence does not undermine the goal of community protection through incapacitation.

B. Can we identify offenders who are likely to re-offend? The failure of selective incapacitation

As has been noted, imprisonment as a means of community protection is only effective if, *but for* being imprisoned, the offender would have committed a further offence. With this in mind, two forms of incapacitation have been advanced. The first is selective incapacitation. This form focuses on the individual offender, and its success is contingent upon distinguishing offenders who will reoffend from those who will not.

The existing evidence suggests that there are no techniques that can accurately predict the likelihood that a particular offender will commit another serious crime in the foreseeable future.[37] In the context of attempting to predict future criminal behaviour, people who commit serious violence and sex offences are often labelled as "dangerous" offenders.[38]

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[36] *ibid.*, 145.

[37] It is possible to predict that offenders who have a long history of minor offending will recidivate, but, as is discussed *post*, it is not economically viable to imprison offenders with this profile.

[38] There is no generally accepted definition of this term, but a suitable definition is "the repetitively violent criminal who has more than once committed, or attempted to commit, homicide, forcible rape, robbery or assault" advanced by S. Dinitz, J.P.P. Conrad, "Thinking about dangerous offenders" (1978) 10 Criminal Justice Abstract 99, 100.

That a person has previously committed a serious offence is a particularly poor guide to identifying future serious offending. A study in the late 1990s tracked the offending behaviour of 613 offenders released from prison in New Zealand for a two and a half year period. The study revealed that those who were classified as serious offenders[39] were no more likely to be again convicted of a serious offence within two and a half years of release than other (ordinary) offenders, and were in fact less likely to be imprisoned within that period of time.[40] It was also found that, of the total number of serious offences committed by the sample group, the vast majority of offences were committed by offenders who were imprisoned for non-serious (or ordinary) offences.[41] In total, only 30 of the sample of 613 offenders committed a serious offence within the follow up period. It was also noted that altering the definition of a "serious offence" provided little hope as a way to achieve crime control.[42]

These findings were consistent with earlier studies in the 1980s that employed other techniques for predicting criminal behaviour. Predictions based on psychiatric data were shown to be wrong as often as 70 *per cent* of the time.[43] Thus, theoretically, tossing a coin might have more accurately predicted whether an offender would reoffend. Despite some initial optimism, other predictive techniques utilising more concrete risk factors – such as employment history or the age of commencement of offending – were also shown to yield a low success rate.[44]

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[39] On the basis of the definition in the *Criminal Justice Act* 1985 (N.Z.), s.2. This essentially relates to crimes of serious violence, such as manslaughter, wounding and robbery.

[40] See M. Brown, "Serious Violence and Dilemmas of Sentencing: A Comparison of Three Incapacitation Policies" [1998] Criminal Law Review 710, 713.

[41] *ibid.*, 714.

[42] *I.e.* there was no definition of "serious offence" which would have resulted in a meaningfully higher prediction rate in relation to future offending: *ibid.*, 714-15.

[43] J. Monahan, "The Prediction of Violent Behaviour: Toward a Second Generation of Theory and Policy" (1984) 141 American Journal of Psychiatry 10. Another study revealed a false positive rate of about 65 *per cent*: see K. Kozol, "Dangerousness in Society and Law" (1982) 13 University of Toledo Law Review 241, 267.

[44] Greenwood claimed that it was possible to identify high risk robbers and burglars by identifying seven supposed risk factors (similar prior convictions, incarceration for over a year in the previous two years; convictions at a young age; time served in a juvenile facility; use of drugs in the past two years; drug use as a juvenile; and employed for less than a year in the last two years) and hence significantly reduce the number of such offences by increasing the prison terms for the high risk offenders: P. Greenwood, *Selective Incapacitation: Report Prepared for the National Institute of Justice* (RAND Corp. 1982). However, it seems that the technique used was flawed. A reanalysis of the original data resulted in less promising results: see A. Blumstein, J. Cohen, C. Visher, *Criminal Careers and "Career Criminals"* (National Academies Press 1986); A. von Hirsch, "Selective Incapacitation:

A wide-ranging analysis in the 1990s of the data regarding the capacity of any discipline to predict future criminal behaviour noted that predictive techniques[45] "tend to invite overestimation of the amount of incapacitation to be expected from marginal increments of imprisonment".[46] In fact, the ability to predict which offenders will likely re-offend is so poor that some academics have estimated the increase in the crime rate from the reduction or abolition of imprisonment to be as low as five *per cent*.[47]

The inability accurately to predict recidivism, and in particular dangerousness, was noted by Kirby J. (in dissent) in the High Court decision of *Fardon v. Attorney-General (Qld)*:

> "Experts in law, psychology and criminology have long recognised the unreliability of predictions of criminal dangerousness. In a recent comment, Professor Kate Warner remarked:
>
> > '[A]n obstacle to preventive detention is the difficulty of prediction. Psychiatrists notoriously overpredict. Predictions of dangerousness have been shown to have only a one-third to 50 *per cent* success rate. While actuarial predictions have been shown to be better than clinical predictions – an interesting point as psychiatric or clinical predictions are central to continuing detention orders – neither are accurate.'"[48]

The heightened terrorism threat over the past decade has resulted in an enormous increase in the literature relating to our capacity to predict dangerousness and the associated issue of the desirability of preventive detention. Despite this, more recent attempts to accurately predict dangerousness have not proved successful, although it has been noted that, "at present, although error rates are lower for actuarial tools than for clinical assessments, they are high when violent and sexual offences are being predicted".[49]

Some Doubts" in A. von Hirsch and A. Ashworth (eds), *Principled Sentencing* (Oxford University Press 1998), 121, 122-23.

45 Including those which go beyond simply looking at prior criminality to such things as employment history and so on.

46 Zimring, Hawkins (n.13), 86.

47 J. Cohen, "The Incapacitative Effect of Imprisonment: A Critical Review of the Literature" in A. Blumstein, J. Cohen, J. Nagin (eds), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (National Academies Press 1978), 209.

48 [2004] HCA 46, [124] (footnotes in original omitted). Kirby J. quotes from K. Warner, "Sentencing review 2002-2003" (2003) 27 Criminal Law Journal 325, 338.

49 See Jessica Black, "Is the Preventive Detention of Dangerous Offenders Justifiable?" (2011) Journal of Applied Security Research 317, 322-323. The most thorough treatment of the subject matter is B. McSherry and P. Keyzer (eds), ***"Dangerous" People: Policy, Prediction and Practice*** (Routledge 2011). See also

B. McSherry and P. Keyzer, ***Sex Offenders and Preventive Detention: Politics,***

The fact that there are so many false positives in any process of selective incapacitation does not necessarily mean that it is flawed. Even if the practice is only – say – one-third accurate, this still thwarts a large number of crimes in absolute terms. It is an attractive proposition to the utilitarian eye. However, the cost in terms of unnecessarily imprisoning the innocent is almost certainly too high: imprisoning three (or two) people to prevent one person from committing a crime offends against deeply- and widely-held libertarian beliefs. There is a moral repugnance about both collective punishment, and any systematic violation of the principle of protecting the innocent before punishing the guilty.[50]

It is certainly easier to identify people who are likely to commit minor offences in the future.

If one focuses solely on the total *number* (as opposed to type) of previous convictions, there is a far greater ability to predict future offenders. Studies in the United Kingdom have shown that offenders with five or more previous convictions have an 87 *per cent* chance of being convicted of another offence within six years.[51] However, high rates of recidivism are essentially restricted to minor offenders.[52] Similar findings have also been reported in Australia, where approximately two-thirds of sentenced offenders received into prison have already served a sentence of imprisonment.[53] However, the results confirmed that previous detention is not a strong indicator regarding future propensity to commit serious offences. About half of those convicted of serious offences had not previously served a prison term. However, about ninety *per cent* of those sent to prison

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Policy
and Practice (Federation Press 2009).

[50] This is illustrated most profoundly by the maxim that "it is better that ten guilty men walk free than one innocent person is convicted". But, for arguments in support of limited forms of preventive detention, see Black, *ibid.*, 322-23. See also A. Von Hirsch and A. Ashworth , *Proportionate Sentencing* (Oxford University Press 2005), ch. 4.

[51] G.J.O. Philpotts, L.B. Lancucki, *Previous Convictions, Sentence and Reconvictions*, (Home Office Research Study no. 53, HMSO 1979), 16.

[52] See A. Ashworth, *Sentencing and Criminal Justice* (2nd edn, Butterworths 1995) 331. Other factors (apart from a previous criminal history) which have been shown to lead to a slightly higher rate of recidivism are unemployment and drug history: see von Hirsch (n.44).

[53] John Walker, *Prison Sentences in Australia* (Trends and Issues in Crime and Criminal Justice no. 20, Australian Institute of Criminology 1989), 5. See, more recently, Jessica Zhang, Andrew Webster, *An Analysis of Repeat Imprisonment Trends in Australia* (Research paper, Australian Bureau of Statistics 2010), <http://www.ausstats.abs.gov.au/ausstats/subscriber.nsf/0/26D48B9A4BE29D48CA25778C001F67D3/$File/1351055031_aug%202010.pdf> accessed March 1, 2012, which noted that an offender who has been in jail previously was nearly three times more likely to be imprisoned within ten years than a first-time prisoner.

for "other good order" offences, and almost eighty *per cent* of those sent to prison for "justice / security offences" (mainly breaches of court orders), were serving a repeat term.

Prioritising the goal of incapacitation for minor repeat offenders is, however, misguided. Certainly, we can predict with a high degree of confidence that such offenders will continue to cause a nuisance to the community. But detaining them for a period significantly longer than is commensurate with the seriousness of the offence violates the principle of proportionality.[54] And, from a pragmatic perspective, it is probably self-defeating given the high cost of imprisonment. A recent study by the Australian Productivity Commission has highlighted this high cost. In Australia, the cost to the community of detaining each prisoner each day amounts to $216,[55] which equates to $79,000 *per* year. It is illogical for any community to expend so much a year to punish a minor offence.[56]

C. General incapacitation does work – but the price might be too high

While selective incapacitation does not work, general incapacitation is more effective in reducing crime.[57] This involves imprisoning large numbers of offenders simply because they have committed a criminal offence – the crime need not be particularly serious and the likelihood of re-offending will be irrelevant. This is termed general (or collective) incapacitation. Little or no effort is normally made to predict future offending patterns, whether on the basis of previous criminal history or other considerations.[58]

There are two theoretical reasons why general incapacitation should work. First, the more people there are in prison, the fewer people there will be who could commit crime in the general community. Accordingly, it must follow that this will reduce the crime rate in absolute terms. However, crime rates are generally

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[54] It was essentially for this reason that the Australian Law Reform Commission (ALRC) rejected the use of incapacitation (and general deterrence) as a proper objective of sentencing: ALRC, *Sentencing* (Report no. 44, 1988), xxviii, 18. About a decade later, however, the New South Wales Law Reform Commission (NSWLRC) regarded incapacitation as an appropriate rationale of sentencing: NSWLRC, *Sentencing* (Report no. 79, 1996), 332.

[55] This is for the 2010 / 2011 financial year: Productivity Commission, *Government Report on Services 2012* (Steering Committee for the Review of Government Service Provision 2012), <http://www.pc.gov.au/__data/assets/pdf_file/0019/114940/24-government-services-2012-chapter8.pdf> accessed March 1, 2012.

[56] See M. Bagaric, "Instant Justice? The Desirability of Expanding the Range of Criminal Offences Dealt With on the Spot" (1998) Monash University Law Review 231, 270.

[57] For a discussion regarding the distinction between special and collective incapacitation see Zimring, Hawkins (n.13), 60-79.

[58] An exception is the Dutch law discussed below which is aimed at recidivists with ten prior convictions.

measured in a relative sense, based on population size. In this relative sense, increasing the rate of imprisonment should also reduce crime. This is because people who commit crime are disproportionately from one sector of the community: the lower socio-economic group.

Poor people are grossly over-represented in gaols across the world.[59] As people become more affluent, they commit less crime – it appears that is because they then have more to lose by being imprisoned. Thus, imprisoning large numbers of poor people should reduce crime in the relative sense as well.

Most of the research into the testing of the general incapacitation model has been undertaken in the United States, presumably because of the unprecedented increase in the prison population over the past 30 years. Early findings suggested, however, that even general incapacitation did not work.

Following the introduction of tougher sentencing laws, the prison population in California in the 10-year period from 1980 to 1990 quadrupled (representing an increase of 120,000 prisoners),[60] such an increase being "without precedent in the statistical record of imprisonment in the Western World".[61] Zimring and Hawkins compared California's movements in crime rates[62] and incarceration levels between 1980 and 1990 with those of sixteen other American states that contain metropolitan areas with populations in excess of 350,000, to control for trends in California unconnected to changes in incarceration policy. The data failed to show a general causal connection between an increased use of incarceration and a reduction in crime, and in particular there was no meaningful evidence of such a connection in California.[63] It was found that the "correlation

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[59] For example, see S. Box, *Recession, Crime and Punishment* (Macmillan 1987), 96. After reviewing sixteen major studies between income inequality and crime, Box concluded that income inequality is strongly related to crime. See also P. Carlen, "Crime, Inequality and Sentencing" in R.A. Duff, D. Garland (eds), *A Reader on Punishment* (Oxford University Press 1994), 309. Prison numbers illustrate this quite graphically. In Australia, the rate of indigenous imprisonment is 14 times higher than the general population's: Australian Bureau of Statistics (n.17).

[60] It may be argued that three strikes statutes in fact pursue a policy of selective incapacitation, in that they attempt to take out of circulation the small percentage of the criminal population whom it is assumed commit most of the crimes. However, as is discussed below, the net is cast so widely that in effect they represent a system of general incapacitation. See also L.S. Beres and T.D. Griffith, "Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation" (1998) 87 Georgetown Law Review 103, 129-33.

[61] Zimring, Hawkins (n.13), 104.

[62] Which were downward.

[63] Zimring, Hawkins (n.13), 104-8.

between variations in incarceration and in aggregate crime is -0.09, a minute (and statistically insignificant) negative correlation".[64]

Findings of this nature did not, however, hamper the pursuit of the incapacitative ideal.

In the mid-1990s, California embarked on a three-strikes sentencing policy (which swept through much of the United States).[65] The policy created mandatory, long gaol terms for repeat offenders. It has resulted in the incarceration of even greater numbers of offenders. In extensive research conducted on the effects of such laws, Stolzenberg and D'Alessio analysed the impact of California's three-strikes laws in the 10 largest cities in the state. California was chosen as an ideal location because: (a) it was one of the first places to implement mandatory three-strikes laws (in March 1994); (b) a large number of people have been charged under the law (over 3,000); and (c), it has one of the toughest such laws in the United States. In California, an accused with one prior serious or violent felony conviction[66] must be sentenced to double the term they would otherwise have received for the instant offence. Offenders with two or more such convictions must be sentenced to life imprisonment with the minimum term being the greater of 25 years, three times the term otherwise provided for by the instant offence, or the term applicable for the instant offence plus appropriate enhancements. The instant offence does not have to be for a serious and violent felony – any felony will do. In fact, world-wide publicity followed from the sentencing of Jerry Dewayne Williams, a 27 year old Californian who was ordered to be imprisoned for 25 years to life without parole for stealing a slice of pepperoni pizza from a group of four youths, based on his previous convictions.[67]

It was anticipated that these laws, by effectively removing career criminals from society, would result in a significant reduction in crime. The 1994 RAND study, for example, predicted that serious

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64 *ibid.*, 107.

65 Three strikes laws were first introduced in Washington in 1993, and have now been adopted in more than 20 states. For a discussion of these laws, see K. McMurry, "Three-strikes Laws Proving More Show Than Go" (1997) Trial 12. For a good overview of such laws, see Beres, and Griffith (n.60), 110-113; J. Austin *et al.*, "The Impact of 'three strikes and you're out'" (1999) 1 Punishment & Society 131, 134-42; E. Chen, "Impacts of 'Three strikes and you're out' on crime trends in California and throughout the United States" (2008) Journal of Contemporary Criminal Justice 345.

66 Initially, there were 28 different "serious" felonies (including burglary) and 17 "violent" felonies (including robbery in an inhabited house). For further discussion, see M.W. Owens, "California's Three Strikes Laws: Desperate Times Require Desperate Measures – But Will it Work?" (1995) 26 Pacific Law Journal 881, 891.

67 Phil Reeves, "'Life' for pizza theft enrages lawyers" *The Independent* (London, March 4, 1995) <http://www.independent.co.uk/news/world/life-for-pizza-theft-enrages-lawyers-1609876.html> accessed March 1, 2012.

crime in California would drop by 28 *per cent*, reaching a peak reduction of 400,000 crimes in 2000.[68] However, California's three-strikes law has since been shown to have had no observable influence on the serious crime rate, and "did not achieve its objective of reducing crime, through either deterrence or incapacitation".[69] Only one city (Anaheim) exhibited a substantial reduction in the serious crime rate. But even that was regarded as a possibly aberrant finding.

> "Most studies of incapacitation suggest that prison exerts a significant suppression effect on crime; however, the estimated effects appear to vary markedly from study to study. Blumstein *et al.*, for example, cite evidence that the level of imprisonment prevailing in the United States (U.S.) during the 1970s would have had an incapacitation benefit of 20 *per cent*.[70] A study of incapacitation in the United Kingdom by Tarling,[71] however, put the incapacitation effect of prison in that country in the mid-1980s at between 7.3 and 9.0 *per cent*. Although the estimates reported by Blumstein and Tarling differ significantly, most incapacitation studies conclude that large increases in the prison population only produce fairly modest reductions in crime. Research in the United States,[72] for example, suggests that in most U.S. states to obtain a 10 *per cent* reduction in crime, the prison population would have to be more than doubled."[73]

However, more recent studies have suggested that the unabated practice of draconian sentencing (increasingly severe penalties and increasing rates and lengths of imprisonment) can reduce crime. This is especially in relation to studies undertaken over a longer period. In the United States between 1990 and 2009:

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[68] It was estimated that most of the drops would be in burglary and assault: P.E. Greenwood *et al.*, *Three Strikes and You're Out: Estimated benefits and Costs of California's New Mandatory Sentencing Law* (The RAND Corp, Santa Monica, 1994); but *cf.* J. Austin, "Three Strikes and You're Out: The Likely Consequences on the Courts, Prisons, and Crime in California and Washington State" (1994) 14 Saint Louis University Public Law Review 239, 257, where he predicts that the laws will be ineffective due to mis-prediction, and will result in prison costs unheard of in western civilised democracies.

[69] Stolzenberg, D'Alessio (n.12), 467. The failure of three strikes laws to reduce crime is also demonstrated in L.S. Beres, T.D. Griffith, "Do Three Strikes Laws Make Sense? Habitual Offender Statutes and Criminal Incapacitation" (1998) 87 Georgetown Law Review 103. See also J. Austin *et al.*, "The Impact of 'three strikes and you're out'" (1999) 1(2) Punishment and Society 131.

[70] Blumstein *et al.* (n.44), 123.

[71] R. Tarling, *Analysing Offending: Data, models and interpretations* (HMSO 1993).

[72] See J. Chan, *The Limits of Incapacitation as a Crime Control Strategy* (Crime and Justice Bulletin no. 25, N.S.W. Bureau of Crime Statistics and Research 1995), 6.

[73] Don Weatherburn, Jiuzhao Hua, Steve Moffatt, How much crime does prison stop? The incapacitation effect of prison on burglary (2006), 4 (in-line references in original converted to footnotes).

(a) the rate of violent crime in the United States dropped by more than 60 per cent, with most of the decline being recorded after 1996; and
(b) the violent victimization rates *per* 1,000 people aged 12 years or older dropped from 44 to 17.[74]

During this period, the imprisonment rate rose from 1.15 million to 2.3 million prisoners.[75] At face value, these figures suggest a causal link between imprisoning greater numbers of offenders and an effective reduction in the crime rate.

Consequently, a number of detailed studies were undertaken to examine and explain the apparent causal link between crime and imprisonment rates. Following an extensive review of the literature, William Spelman stated that up to 21 *per cent* of crime reduction is attributable to the increased rate of imprisonment.[76] However, Spelman is unclear whether the reduction is attributable to the incapacitation of offenders (who are thereby prevented from committing crimes whilst they are imprisoned) or to the salutary effects of marginal general deterrence. However, as has been noted (*ante*), the theory of specific deterrence has been debunked; therefore, at least some of the drop in crime should be attributed to the higher use of imprisonment.[77]

Other studies support the success of incapacitation, but remain equally unclear about its precise impact. According to literature examined by Roger Warren, a 10 *per cent* increase in imprisonment rates produces a 2 to 4 *per cent* reduction in the crime rate; however most of this relates only to non-violent offences.[78]

A number of other explanations have been offered for the reduced crime rate; including greater police presence and some other, seemingly remote, explanations. Steven Levitt attributes the drop in the crime rate in 1990s in the United States to four factors: increased police numbers (there was a 14 *per cent* increase in police numbers during the 1990s, which was thought to explain between 10 to 20 *per*

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74 Bureau of Justice Statistics, *National Crime Victimization Survey Violent Crime Trends, 1973-2008*: <http://bjs.ojp.usdoj.gov/content/glance/tables/viortrdtab.cfm> accessed March 1, 2012. The rate of decline in other forms of crime was similar.

75 Bureau of Justice Statistics, *Correctional Populations* <http://bjs.ojp.usdoj.gov/content/glance/tables/corr2tab.cfm> accessed March 1, 2012.

76 W. Spelman, "What Recent Studies Do (and Don't) Tell Us About Imprisonment and Crime" (2000) 27 Crime & Justice 419, 485. See also A. Blumstein, J. Wallman, *The Crime Drop in America* (Cambridge University Press 2000).

77 Some of this reduction is also attributable to more police (see *post*).

78 See R. Warren, "Evidence-Based Sentencing: The Application of Principles of Evidence-Based Practice to State Sentencing Practice and Policy" (2009) 43 University of San Francisco Law Review 585, 594, and the references cited therein.

cent of the decrease);[79] the waning of the crack-cocaine epidemic; the legalization of abortion (which resulted in a greater number of people from deprived social backgrounds terminating pregnancies); and, finally, the increased use of imprisonment. In relation to the growing prison population he noted that:

> "Using an estimate of the elasticity of crime with respect to punishment of 2.30 for homicide and violent crime and 2.20 for property crime, the increase in incarceration over the 1990s can account for a reduction in crime of approximately 12 *per cent* for the first two categories and 8 *per cent* for property crime, or about one-third of the observed decline in crime. Annual expenditures on incarceration total roughly $50 billion annually.
>
> "Combining this spending figure with the cost of crime to victims and elasticities noted above, expenditures on prisons appear to have benefits that outweigh the direct costs of housing prisoners, subject to three important caveats. First, a dollar spent on prisons yields an estimated crime reduction that is 20 *per cent* less than a dollar spent on police, suggesting that on the margin, substitution toward increased police might be the efficient policy. Second, it seems quite plausible that substantial indirect costs are associated with the current scale of imprisonment, such as the adverse societal implications of imprisoning such a large fraction of young African American males. Finally, given the wide divergence in the frequency and severity of offending across criminals, sharply declining marginal benefits of incarceration are a possibility. In other words, the two-millionth criminal imprisoned is likely to

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[79] S.D. Levitt, "Understanding Why Crime Fell in the 1990s: Four Factors That Explain the Decline and Six That Do Not" (2004) 18 Journal of Economic Perspectives 163, 177. Levitt contends that this was a good financial investment:

> "Whether this investment in police has been a cost-effective approach to reducing crime is a different question. As noted above, annual expenditures on police are approximately $60 billion, so the cost of the 14 *per cent* increase in police (assuming marginal cost is equal to average cost, which is likely to be a reasonable approximation) is $8.4 billion a year. The benefits of crime reduction are more difficult to quantify. The most commonly used estimates of the cost of crime to victims (for example, Miller, Cohen and Rossman, 1993) places the costs of crime at roughly $500 billion annually in the early 1990s. Given the sharp declines in crime, today's estimates would likely be substantially lower – perhaps $400 billion in current dollars. If the increase in police reduced crime by 5-6 *per cent*, then the corresponding benefit of crime reduction is $20–25 billion, well above the estimated cost. Thus, at least to a crudest approximation, the investment in police appears to have been attractive from a cost-benefit perspective."

ibid., 177, quoting T. Miller, M. Cohen and S.B. Rossman, "Victim Costs of Violent Crime and Resulting Injuries" (1993) 12(4) Health Affairs 186.

> impose a much smaller crime burden on society than the first prisoner. Although the elasticity of crime with respect to imprisonment builds in some declining marginal returns, the actual drop off may be much greater. We do not have good evidence on this point. These caveats suggest that further increases in imprisonment may be less attractive than the naive cost benefit analysis would suggest."[80]

The success of general incapacitation is, however, disputed by parallel studies in neighbouring Canada, where similar crime reduction trends occurred over approximately the same period. During that period, the imprisonment rate in Canada actually fell.[81]

One constant finding to emerge regarding the success of general incapacitation is that it is usually effective only in relation to minor crime.

The effectiveness of general incapacitation for relatively minor offences is supported by an Australian study that measured the impact of imprisonment on burglary rates, concluding that:

> "[A]t least so far as burglary is concerned, prison does seem to be an effective crime control tool. Our best estimate of the incapacitation effect of prison on burglary (based on the assumption that burglars commit an average of 38 burglaries per year when free) is 26 *per cent*. This estimate does not appear to be overly sensitive to the value of offending frequency we assume. … These percentage effects might not seem large but in absolute terms an incapacitation effect of 26 *per cent* is equivalent to preventing over 44,700 burglaries per annum…
>
> "The fact that prison is effective in preventing a large number of burglaries raises the question of whether increased use of imprisonment would be an effective way of further reducing the burglary rate. Our findings on this issue, like those of incapacitation studies in Britain and the United States,[82] are not that encouraging. They suggest that a doubling of the sentence length for burglary would cost an additional $26 million per annum but would only reduce the annual number of burglaries by about eight percentage points. A doubling of the proportion of convicted burglars would produce a larger effect (about 12 percentage points) but only if those who are the subject of our new penal policy offend as frequently as those who are currently being imprisoned. Given what we know about the frequency of offending

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80 Levitt, (n.79).

81 R. Paternoster, "A century of criminal justice: crimes and punishment: So, how much do we really know about criminal deterrence?" (2010) Journal of Criminal Law and Criminology 765, 803.

82 Cohen (n.47), Tarling (n.71).

> amongst burglars who do not currently receive a prison sentence, this seems highly unlikely…"[83]

Similar findings are reported regarding sentence enhancements imposed on offenders in the Netherlands.[84] A law passed in 2001 required increased sentence severity (by up to three years' imprisonment) for offenders who had ten or more prior convictions.[85] By 2007, 1,400 offenders were sentenced under this regime, most of them non-violent offenders.[86] The result was a dramatic drop in the rate of burglary and car theft in the ten cities in which the law operated. The report concluded:

> "We find that in a situation of a relatively low rate of incarceration sentence enhancements for a carefully selected group of prolific offenders can dramatically reduce the crime rate…. Although the group of offenders sentenced under the law accounted for only five *per cent* of the prison population six years after its introduction, the sentencing policy lowered the rate of burglary and theft from car by an estimated 40 *per cent* through the incapacitation effect alone. …
>
> "When comparing the cost of enhanced prison sentences with the social benefits of lower crime rates, we find the benefits of the policy to exceed the costs. Even for this highly selective sentencing policy that only affected 1,400 offenders in the period 2001-2007 we find evidence for rapidly decreasing returns to scale. The marginal crime-reducing effect of incapacitating another prolific offender declines by more than half from the lowest to the highest rate of application of the law. The benefit-cost ratio drops sharply when more offenders are serving time under the habitual offender law. …
>
> "The Dutch policy of selective incapacitation started from a low base [in terms of the length of sentences and imprisonment rate]. … To compare: an enhanced prison sentence for burglary of two to three years based on the Dutch habitual offender law is comparable to the default sentence for burglary in the United States.[87] Our finding that

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[83] Weatherburn *et al.* (n.73), 7-8 (in-line reference in the original converted to a footnote).

[84] B. Vollaard, *Preventing Crime Through Selective Incapacitation* (CentER Discussion Paper no. 2010-141, 2010) <http://arno.uvt.nl/show.cgi?fid=113525> accessed March 1, 2012.

[85] In absolute the terms the increase was not drastic. The habitual offender law allowed for sentences of imprisonment of two to three years to be imposed in most cases: *ibid.*, 33.

[86] *ibid.*, 6.

[87] Lance Lochner, *Education Policy and Crime* (NBER Working Paper no. 15894, National Bureau of Economic Research 2010), table 1.

> the habitual offender law adopted in the Netherlands had a large incapacitation effect should therefore not be interpreted as evidence that all policies of selective incapacitation are likely to have a similarly favourable cost-benefit ratio."[88]

D. Conclusion on incapacitation

Incapacitation aims to protect the community. While selectively confining individuals disables them directly from committing further offences in the community for a period of time, it in itself does not justify the unrestrained use imprisonment as a prophylactic against crime. Particularly in relation to serious offending, the weight of evidence provides no justification for routinely committing such offenders to prison because of the failure of any method to predict (with sufficient certainty or accuracy) which offenders are likely to commit serious offences again, in the future.[89]

While we can (and do) know that recidivistic minor offenders are likely to reoffend, in probably minor ways, the social utility of their confinement may be outweighed by the direct economic cost and the consequent social cost stemming from the misallocation of limited resources.

At the more general level, there is some stronger evidence that general incapacitation does work. Casting the imprisonment net very widely does seem to reduce crime. However, the total number of people that must be imprisoned in order to achieve a relatively small percentage decrease in the crimes rate is considerable, and it is therefore doubtful whether, on a cost / benefit analysis, this can be justified. To the extent that it does work, the Dutch experience shows that it operates most effectively in a context where there the rate of imprisonment is low and sentences are not overly punitive. These conditions do not prevail in Australia.

IV. THE JUSTIFICATION FOR THE ONGOING USE OF IMPRISONMENT

A. The principle of proportionality

Incapacitation does not exhaust the sentencing objectives that seek to justify the use of imprisonment. Other than incapacitation, the two most common objectives that are invoked to justify imprisonment are

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88 *ibid.*, 33-34 (in-line reference in the original converted to a footnote).

89 It could be argued that offenders who commit an offence of a violent or sexual nature should be required to bear the risk of being a false positive in order to secure the imprisonment of the true positives. However, as has been seen, the likelihood of an inaccurate assessment of future serious offending is so significant that it is not tenable to provide a normative justification for this approach.

general deterrence and specific deterrence. It is beyond the scope of this article to consider these objectives at length. However, the empirical data suggests that harsh punishment cannot secure these objectives.[90]

The analysis above does not, however, mean that imprisonment should be entirely discarded as a criminal sanction. Some offences are so serious that, arguably, they demand such a response. The key determinant in sentencing is (properly) the principle of proportionality.[91] In crude terms, this means that the punishment must fit the crime.[92] This principle is underpinned by the basic idea that benefits and burdens should be distributed with regard to, and commensurate with, a person's merit or blame.

The proportionality principle is a key determinant regarding the appropriate sentence that should be imposed. It does not of itself justify the infliction of punishment. Most clearly, it is consistent with a retributive (or just-deserts) theory of punishment; however, it has been argued that it also consistent with a utilitarian approach to punishment.[93]

A clear statement of the principle of proportionality is found in the High Court case of *Hoare v. R.*:[94]

> "A basic principle of sentencing law is that a sentence of imprisonment imposed by a court should never exceed that which can be justified as appropriate or proportionate to the

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[90] **Bagaric,** Alexander, 2011 (n.3); M. Bagaric, *Punishment and Sentencing: A Rational Approach* (Cavendish 2000), ch. 5.

[91] Preserving proportionality between the seriousness of the offence and the severity of the sentence is a principle adhered to by all western legal systems: see R.S. Frase, "Comparative Perspectives on Sentencing Policy and Research", in M. Tonry, R. Frase (eds), *Sentencing and Sanctions in Western Countries,* (Oxford University Press 2001), 259, 261, cited in Ruth Kannai, *Preserving Proportionality in Sentencing: Constitutional or Criminal Issue* (paper for the International Society for the Reform of Criminal Law, 2004) <http://www.isrcl.org/Papers/2004/Kannai.pdf> accessed March 1, 2012. On the primacy of proportionality as a sentencing guide, see von Hirsch, Ashworth, *Proportionate Sentencing* (n.50).

[92] Proportionality does not fit neatly in relation to some offences. As noted in George Fletcher, *Loyalty: An Essay on the Morality of Relationships* (Oxford University Press 1993), 43:

> "Just punishment requires a sense of proportion, which in turn requires sensitivity to the injury inflicted. … The more the victim suffers, the more pain should be inflicted on the criminal. In the context of betrayal, the gears of this basic principle of justice, the *lex talionis*, fail to engage the problem. The theory of punishment does not mesh with the crime when there is no tangible harm, no friction against the physical welfare of the victim."

[93] M. Bagaric, "Proportionality in Sentencing: Its Justification, Meaning and Role" (2000) 12 Current Issues in Criminal Justice 143.

[94] [1989] HCA 33, (1989) 167 C.L.R. 348.

> gravity of the crime considered in light of its objective circumstances."[95]

The proportionality principle has two limbs: the harm caused by the offence and the level of pain inflicted by the punishment. The principle is satisfied if these limbs are matched.

In *Veen (No. 1) v. R.*[96] and *Veen (No. 2) v. R.*,[97] the High Court of Australia stated that proportionality is the primary aim of sentencing. It is considered so important that it cannot be trumped even by the goal of community protection, which, at various times, has also been declared as the most important objective of sentencing.[98] Thus, in the case of dangerous offenders, whilst community protection remains an important objective, at common law it cannot override the principle of proportionality. It is for this reason that preventive detention is not sanctioned by the common law.[99] Proportionality operates to restrain not only sentences that are too heavy, but also those that are too light.[100]

Proportionality has also been given statutory recognition in most Australian jurisdictions. For example, in Victoria, the *Sentencing Act* 1991 (Vic.) provides that one of the purposes of sentencing is to impose just punishment,[101] and that in sentencing an offender the court must have regard to the gravity of the offence[102] and the offender's culpability and degree of responsibility.[103] The *Sentencing Act* 1995 (W.A.) states that the sentence must be "commensurate with the seriousness of the offence",[104] and the *Crimes (Sentencing) Act* 2005 (A.C.T.) provides that the sentences must be "just and appropriate".[105] In the Northern Territory and Queensland, the relevant sentencing statutes provide that the punishment imposed on the offender must be just in all the circumstances,[106] while in South Australia the emphasis is upon ensuring that "the defendant is adequately punished for the offence".[107] The need for a sentencing court to ensure that the offender is "adequately punished" is also

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95 *ibid.*, 354.
96 [1979] HCA 7, (1979) 143 C.L.R. 458, 467.
97 [1988] HCA 14, (1988) 164 C.L.R. 465, 472.
98 For example, see *R. v. Channon* (n.7); *R. v. Valenti* (1980) 48 F.L.R. 416, 420; *R. v. El Karhani* (1990) 21 N.S.W.L.R. 370, 377.
99 *R. v. Chester* [1988] HCA 62, (1988) 165 C.L.R. 611, 618.
100 *R. v. Hernando* [2002] NSWCCA 203, (2002) 136 A.Crim.R. 451, 459.
101 Section 5(1)(a).
102 Section 5(2)(c).
103 Section 5(2)(d).
104 Section 6(1)(a).
105 Section 7(1)(a). The *Sentencing Act* 1997 (Tas.), however, does not refer to the principle of proportionality.
106 *Sentencing Act* 1995 (N.T.) s.5(1)(a); *Penalties and Sentences Act* 1992 (Qld) s.9(1)(a).
107 *Criminal Law (Sentencing) Act* 1988 (S.A.) s.10(1)(k).

fundamental to the sentencing of offenders for Commonwealth matters.[108] The same phrase is also used in New South Wales.[109]

The courts have not attempted to define exhaustively the factors that are relevant to proportionality. The broad approach taken to this problem is to adopt the principle that the upper limit for an offence depends on its objective circumstances. However, some factors have been positively identified as relevant to offence seriousness. These include the consequences of the offence (including the level of harm), the victim's vulnerability, the method of the offence, the offender's culpability (which turns on such factors as the offender's mental state[110]), and the level of sophistication involved in the commission of the offence.[111]

The key to injecting content into the proportionality thesis is to ascertain, in practical terms, the actual pains and burdens of crime and punishment (and in particular imprisonment). The hardship stemming from the deprivation of liberty (*i.e.* imprisonment) is of a wholly different character to the hardship of having one's physical or sexual integrity stripped, or of having one's life savings taken away. Much research is still needed in this area.

As noted by von Hirsch and Jareborg, in developing their "living standard approach" to offence seriousness,[112] "virtually no legal doctrines have been developed on how the gravity of harms can be compared".[113]

The real-world interests affected by the sentencing process are too important to be left to armchair speculation or intuitive hunches: these should not be allowed to continue to define the lives of victims and offenders. On the basis of the current empirical data, however, it is possible to reach some tentative but valid conclusions about the impact of crime on individual well-being – both as a victim, and as a perpetrator sentenced to imprisonment.

B. The evidence regarding the effects of crime

1. Victims

The best information available suggests that victims of crime typically suffer considerably – in fact, more than is manifest from the obvious and direct effects of crime. The problem with some studies is that

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108 *Crimes Act* 1914 (Cth) s.16A(2)(k).

109 *Crimes (Sentencing Procedure) Act* 1999 (N.S.W.), s.3A(a).

110 For example, whether it was intentional, reckless or negligent.

111 New South Wales Law Reform Commission, *Sentencing* (Discussion Paper no. 33, 1996), 62-64.

112 A. von Hirsch and N. Jareborg, "Gauging Criminal Harm: A Living-Standard Analysis" (1991) 11 Oxford Journal of Legal Studies 1.

113 *ibid.*, 3.

they do not distinguish adequately between different types of crime to determine the relative impact of criminal offence types. However, the available data suggests that victims of violent crime and sexual crime have their prosperity and well-being set back more significantly than victims of other types of crime.

A recent article reviewed the existing literature regarding the impact of violent and sexual crimes on key quality of life indices.[114] Among others, it examined victims of rape, sexual assault, aggravated assault, intimate partner violence, and survivors of homicide (*i.e.* relatives of those killed). The key quality of life *indicia* examined were: role function (*i.e.* the capacity to perform in the roles of parenting and intimate relationships, and to function in social and occupational domains); reported levels of life satisfaction; and well-being and social-material conditions (*i.e.* physical and mental health conditions). The report demonstrated that many victims suffered considerably across a range of well-being *indicia*, well after the physical signs of the harm suffered had passed. The report concluded:

> "In sum, findings from the well-established literature on general trauma and the emerging research on crime victimization indicate significant functional impact on the quality of life for victims. However, more research is necessary to understand the mechanisms of these relationships and differences among types of crime victimization, gender, and racial / ethnic groups."[115]

Findings showed that victims of violent crime and sexual crime in particular have:

- difficulty in being involved in intimate relationship and far higher divorce rates;[116]
- diminished parenting skills (although this finding was not universal);[117]
- lower levels of success in the employment setting (especially in relation to victims who had been abused by their partners) and much higher levels of unemployment;[118]
- considerable impairment and dysfunction in social and leisure activities, with many victims retreating from conventional social supports;[119] and

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114 Rochelle F. Hanson, Genelle K. Sawyer, Angela M. Begle, Grace S. Hubel, "The Impact of Crime Victimization on Quality of Life" (2010) 23(2) Journal of Traumatic Stress 189.
115 *ibid.*, 194.
116 *ibid.*, 191-92.
117 *ibid.*, 191.
118 *ibid.*, 192.
119 *ibid.*, 193.

- high levels of direct medical costs associated with violent crime (over $24,353 for an assault requiring hospitalization).

Surprisingly, the literature did not report a considerable reduction in self-reported life satisfaction.[120]

A study published in 2006 focusing on victims in the United Kingdom found that:

- victims of violent crime were 2.6 times as likely as non-victims to suffer from depression, and 1.8 times as likely to exhibit hostile behaviour five years after the original offence;[121] and
- for 52 *per cent* of women who had been seriously sexually assaulted in their lives, their experience led to either depression or other emotional problems, and, for one in 20, it led to attempted suicide (64,000 women living in England and Wales to-date have tried to kill themselves following a serious sexual assault).[122]

In a study examining the effects of either violent or property crime on the health of 2,430 respondents,[123] Britt notes:

> "Victims of violent crime reported lower levels of perceived health and physical well being, controlling for measures of injury and for sociodemographic characteristics."[124]

These findings were not confined to violent crime. Victims of property crime also reported lower levels of perceived well-being. But this was less profound than in the case of violent crime.[125]

2 Perpetrators: the ongoing adverse impact of imprisonment

For imprisoned perpetrators, similar conclusions seem to follow. The negative effects of imprisonment appear to continue long after the immediate hardship has ceased. The depravity of prison conditions has been well documented, even in relation to modern democracies,[126] and the "pains" of imprisonment extend far beyond the immediate deprivation of liberty, including:

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120 *ibid.*.

121 M. Dixon, H. Reed, B. Rogers, L. Stone, *The Unequal Impact of Crime* (Institute for Public Policy Research 2006), 25.

122 *ibid.*, 39.

123 Chester L. Britt, "Health Consequences of Criminal Victimization" (2001) 8 International Review of Criminology 163.

124 *ibid.*

125 See also A.M. Denkers, F.W. Winkel, "Crime Victims' Well-Being and Fear in a Prospective and Longitudinal Study" (1998) 5 *International Review of Victimology* 141.

126 For an overview of the prison conditions in Greece, see Leonidas K. Cheliotis, "Suffering at the Hands of the State Conditions of Imprisonment and Prisoner Health in Contemporary Greece" (2012) 9(1) European Journal of Criminology 3. Greece is an interesting case analysis because, in a relatively short period of time,

- the deprivation of goods and services;[127]
- the deprivation of heterosexual relationships;[128]
- the deprivation of autonomy;[129] and
- the deprivation of security.[130]

How these deprivations actually affect the life trajectories of prisoners is not well known, but the evidence indicates that it has a considerable negative impact which transcends the actual term of imprisonment. Research shows that imprisonment impacts adversely on prosperity measures after the conclusion of the sentence, even to the point of significantly reducing life expectancy.

A study which examined the 15.5-year survival rate of 23,510 ex-prisoners in the U.S. state of Georgia found much higher mortality rates for ex-prisoners than the rest of the population.[131] There were 2,650 deaths in total, which was a 43 *per cent* higher mortality rate than normally expected (*i.e.* 799 more ex-prisoners died than expected).[132] The main causes for the increased mortality rates were homicide, transportation accidents, accidental poisoning (which included drug overdoses) and suicide.[133]

Most offenders released from prison continue to have their well-being set back in more ways than increased mortality rates. A recent New Zealand study[134] showed that post-release offenders displayed vulnerabilities associated with:

- financial stressors;

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it has gone from a low imprisonment rate country to one which imprisons relatively high numbers of offenders.

127 Gresham Sykes, *The Society of Captives: A Study of a Maximum Security Prison* (Princeton University Press 1958), chapter 4: "The Pain of Imprisonment", 285, 287.

128 *ibid.*, 289

129 *ibid.*, 290

130 *ibid.*, 292. See also J. Tosh, *The Pains of Imprisonment* (Sage Publications 1982).

131 Anne C. Spaulding *et al.,* "Prisoner Survival Inside and Outside of the Institution: Implications for Health-Care Planning" (2011) 173(5) American Journal of Epidemiology 479, <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC3044840/> accessed March 1, 2012.

132 However, this and other studies reported lower mortality while in prison. It was postulated that this could be because of:

> "access to health care that many persons lack on the outside; a controlled environment, with fewer hazards and a more regular sleep schedule and diet; compassionate release of moribund inmates just prior to death; and selection of already-healthy persons based on their ability to commit crime".

133 The higher mortality rates for ex-prisoners was consistent with findings in other reports, which are cited in the article.

134 Michael Roguski, Fleur Chauvel , *The Effects of Imprisonment of Inmates' and their Families' Health and Wellbeing* (New Zealand National Health Committee 2009). The value of this research is limited by its small sample size – consisting of only 63 participants.

- drug or alcohol temptations;
- social interactions;
- re-learning how to make decisions; and
- deciding whether or not to tell people of their incarceration history.[135]

The report further noted that post-release offenders who lacked strong networks were extremely vulnerable. Where, for example, they could not find work, or their income was delayed, participants reported:

- hunger and homelessness due to insufficient funds;
- an inability to afford health and mental health care;
- failures to fill prescriptions; and
- little support in attempting to rectify the problems they faced, and little advocacy for the improvement of their circumstances.[136]

C. Matching the worst crimes to the worst forms of punishment

The above data indicates that the effects of being either a victim of a serious sexual or violent crime, or an inmate of a prison, may both previously have been underestimated. Both experiences seem to have profoundly negative impacts on life trajectories, which continue well after the immediate event has ceased. On this crude measure, they are matched in terms of the relative negative impacts, and hence satisfy the test for proportionality. Of course, this says nothing about the length of imprisonment that is appropriate for certain categories of sexual and violent offences. However, this crude empirically based technique is preferable to the theoretical hypothesising that is currently used for offence and sanction matching.

A general principle of sentencing that imprisonment should be reserved for serious and violent offenders, would constitute a profound change to prison demographics, and result in a large reduction in prison numbers. In Australia, in 2010, only 50 *per cent* of people were in prison for committing a "serious violence offence" (defined as homicide, a sexual offence, or robbery). In the other 16 *per cent* of cases, the most serious offence was a property offence. In the remaining 34 *per cent* of cases, imprisonment was the result of some other offence type (defined as either fraud offences, justice offences, offences against government, driving offences, or drug offences).[137] Aside from the immediate socio-economic benefits, adopting a new paradigm for the circumstances in which imprison-

135 *ibid.*, 61.
136 *ibid.*, 61.
137 *Australian crime: Facts & figures: 2011* (n.16).

ment is a suitable disposition will result in greater coherency between the empirical evidence, sentencing theory and judicial practice.

This, of course, raises the question of how to deal with non-serious and non-violent offenders, especially given the higher recidivism rate in respect of those offenders. The answer does not lie in totally abandoning the incapacative ideal. The community should still strive to protect itself by preventing offenders from re-offending.

Descriptively, the word "incapacitation" means more than just imprisonment. Criminal justice should embrace new technologies and cast aside the centuries old adherence to imprisonment as the mainstay of community protection. The default incapacative sanction should be an existence monitored round-the-clock by use of electronic bracelets and, if necessary, CCTV. Electronic monitoring is already possible under curfew orders imposed under the *Criminal Justice Act* 1991 (U.K.), ss.12 and 13. While this is a promising first step, these orders cannot be made for periods exceeding six months.[138]

V. CONCLUSION

Because there are no reliable techniques for predicting which offenders will commit serious crime in the future, selective incapacitation as a means of community protection is a fallacy. Moreover, while many minor offenders do re-offend, the social cost of their offending does not outweigh the economic burden of choosing to incarcerate them. Similarly, imprisoning massive numbers of people would undoubtedly reduce crime, but it would also offend against our intrinsic notions of justice. Nor would such an approach be justifiable on a global cost / benefit analysis. Thus, general incapacitation and selective incapacitation are equally flawed.

However, the failure of incapacitation does not mean that imprisonment should be abolished. It is the only proportionate response to those offences that set back the interests of victims in a significant way. It is apparent that serious violations of physical and sexual integrity have the most enduring and adverse effects upon individual victims. Similarly, the adverse consequences of imprisonment on inmates also endure beyond the duration of the prison term. In light of this correlation, imprisonment is a justifiable punishment for those convicted of a "serious violence offence" – homicide, a sexual offence, or robbery. Equally, because imprisonment is not the only form of incapacitation, it may still play a

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[138] A review in 2006 of the electronic monitoring of offenders found that its cost is about one-fifth that of imprisonment, and that it is "robust" in detecting violations of the term of the order: U.K. National Audit Office, *The Electronic Monitoring of Adult Offenders* (HMSO 2006) <http://www.nao.org.uk/publications/0506/the_electronic_monitoring_of_a.aspx> accessed March 1, 2012.

role in the sentencing process – if its content is re-defined. It remains desirable to attempt to stop re-offending in relation to less serious offences, where incapacitation by means other than imprisonment may prove highly successful. The use of monitoring devices, which cost approximately one-fifth as much as imprisonment, and are potentially more effective in reducing recidivism and avoiding the deleterious effects of imprisonment, should be part of that new content. Where offenders fail to observe such orders, a breach should result in some, or all, of the remaining sentence being served in prison.

Finally, it is important to identify the qualifications or limits to the reforms suggested in this article. The empirical evidence suggesting that victims of sexual and violent offences have the poorest life trajectories is weighty, but not definitive. More research needs to be undertaken regarding the effects of these crimes on victims. In addition, further studies are needed to understand better the effects of other forms of crime on victims. If it transpires that other forms of crimes also devastate the lives of victims in such a significant way, a strong case can be made for expanding imprisonment to such offences.

Existing research into the effects of imprisonment is rudimentary. We know that imprisonment causes considerable negative effects on well-being subsequent to release from prison, but the precise nature, gravity and duration of these effects remain speculative. Only once this information is obtained can something close to accurate modelling occur – modelling which must match the pain caused by crime to the hardship emanating from imprisonment, in order to satisfy the cardinal sentencing objective of proportionality. Until this can be done, one should err on the side of economic conservatism and of civility, and desist from unnecessarily brutalising increasing numbers of offenders for little gain. This is achieved by confining imprisonment only to those who do the most brutal harm: that inherent in sexual and violent offences.

JURISDICTION SPOTLIGHT: SOUTH AFRICA

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ABSTRACT

A major objective of the South African Constitution of 1996, mentioned in its Preamble, is to "[h]eal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights". Not only are due process rights specifically protected in the Constitution under section 35, but also all rules of criminal law, procedure and evidence (and their application) have to conform to the provisions of the Bill of Rights in Chapter 2 of the Constitution. Since its inception in 1994, the South African Constitutional Court has confronted numerous constitutional challenges to legislative and common-law rules of criminal justice. This spotlight falls on (i) the impact of the judgments of the South African Constitutional Court (and the Supreme Court of Appeal in recent years) on criminal law, procedure, evidence and punishment; (ii) an evaluation of the South African legislature's recent introduction of a formal system of diversion of juvenile offenders and the enactment of sweeping reform of the definition of sexual offences; and (iii) a brief overview of court structures and rules of legal practice in South Africa.

I. BACKGROUND

South African criminal law (whether in its legislative, common-law or customary form) must comply with the provisions of the Bill of Rights contained in Chapter 2 of the *Constitution of the Republic of South Africa* 1996.[1] The Constitutional Court, established in 1994,

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[1] Section 8(1) of the Constitution states that the Bill of Rights binds all organs of State. The criminal law involves the State acting in its executive and administrative capacity and so rules of criminal law would have to be compatible with the provisions of the Bill of Rights (see Kentridge J. in *Du Plessis v. De Klerk*, 1996 (3) SA 850 (Constitutional Court), 881D-E). There is a "direct" relationship between State and accused in every criminal trial. Issues of "horizontal" relationships that bedevil the civil law do not apply in the context of the criminal law.

has delivered a number of judgments on the compliance or non-compliance of rules of criminal law, procedure and evidence with rights set out in the Bill of Rights.[2] A rule (or practice) of criminal law involving an infringement of a right protected in the Bill of Rights will lead to constitutional invalidity if the infringement is not "reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom".[3]

The criminal justice system in South Africa has for some time been facing high crime rates and overcrowding in prisons. Although 2010-11 crime statistics issued by the Government appear to reveal a 2.5 to 5 *per cent* decrease in reported serious crime since 2003-4, the 2010-11 year still reflects an alarming 15,940 reported murders, 66,196 sexual offences and 101,463 aggravated robberies. Minimum sentence legislation,[4] which came into force in 1998, and the abolition of the death penalty by the Constitutional Court in *Makwanyane*[5] in 1995 have contributed to a massive increase in prisoners serving life imprisonment (433 in 1995, now 10,349, as estimated by the South African Institute of Race Relations[6]). It is also estimated that 48 *per cent* of all prisoners are now serving sentences of more than ten years, compared to two *per cent* in 1995.[7] This all contributes to serious overcrowding in prisons. The Department of Correctional Services apparently intends to review the minimum sentence legislation.[8]

A specialised crime-fighting unit (popularly known as the "Scorpions" and located within the National Prosecuting Authority) was disbanded by legislation and recently replaced with the Directorate of Priority Crime Investigation (a unit popularly known as the "Hawks" and located within the South African Police Services). The establishment of the Hawks has faced a Constitutional challenge, on the grounds that the legislative process through which this unit was established failed to facilitate public involvement. The Constitutional Court in *Glenister v. President of the Republic of South Africa*[9] dismissed this challenge, but held (by a majority) that legislative establishment of the Hawks failed to secure for the

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2 See Parts III and IV, *post*.

3 The so-called "limitations clause" in s.36 of the *Constitution of the Republic of South Africa*, 1996.

4 See Part VI.B., *post*.

5 *S. v. Makwanyane* [1995] ZACC 3, 1995(3) SA 391; see Part III, *post*,

6 South African Institute of Race Relations, cited in "Number of lifers in South African prisons has increased by 2 290% since 1995", *Cape Times* (Cape Town, March 6, 2012).

7 *ibid.*

8 *ibid.*

9 [2011] ZACC 6, 2011 (3) SA 347.

unit an adequate degree of independence from political influence and interference. The declaration of constitutional invalidity of the legislation establishing the Hawks was suspended for 18 months in order to give Parliament the opportunity to remedy the defect.

The majority of the Constitutional Court held in *Glenister* that the South African Constitution and the country's international obligations required the establishment and maintenance of an independent body to combat corruption and organised crime. Organised crime (including money laundering and racketeering) is punishable in South Africa under the *Prevention of Organised Crime Act* 1998,[10] combined with the *Financial Intelligence Act* 2001;[11] corruption under the *Prevention and Combating of Corrupt Activities Act* 2004;[12] and "terrorism" under the *Protection of Constitutional Democracy Against Terrorism and Related Activities Act* 2004.[13] Inter-relationship between the *Prevention of Organised Crime Act* 1998 and the *International Co-operation in Criminal Matters Act* 1996[14] was recently examined by the Constitutional Court in *Falk v. N.D.P.P.* [15]

Under the *Implementation of the Rome Statute of the International Criminal Court Act* 2002,[16] South Africa has incorporated the Statute's definitions of genocide, crimes against humanity and war crimes into domestic law, but the principles of the South African criminal law and the Constitution will remain paramount in interpreting the detailed meaning of the requirements of these international criminal definitions.

II. STRUCTURE OF SOUTH AFRICAN COURTS

Section 166 of the *Constitution of the Republic of South Africa* 1996 provides for the Constitutional Court, Supreme Court of Appeal, High Courts, magistrates' courts and any other courts established or recognised by an Act of Parliament, including any court with a similar status to either High courts or magistrates' courts.

A diagram of the Courts of South Africa relevant to criminal law practice can be found overleaf.

10 Act 121 of 1998.
11 Act 38 of 2001.
12 Act 12 of 2004.
13 Act 33 of 2004.
14 Act 75 of 1996.
15 [2011] ZACC 26, 2011 (11) BCLR 1134.
16 Act 27 of 2002.

SOUTH AFRICAN CRIMINAL COURT SYSTEM

Constitutional Court

History: Established in 1994, under the *Interim Constitution* 1993.

Jurisdiction: Apex court for all constitutional matters (*Constitution of the Republic of South Africa* 1996, s.167(3)).

Supreme Court of Appeal

History: Succeeded the Appellate Division of the former Supreme Court of South Africa, and renamed under section 166 of the *Constitution* 1996.

Jurisdiction: Court of last resort for all except constitutional matters (*Constitution* 1996, s.168(3)). Hears appeals from the High Courts. Leave to appeal must be sought.

High Courts

History: Formerly the Supreme Courts, and renamed under section 166 of the *Constitution* 1996.

Jurisdiction: Superior court of law, having general jurisdiction (*Constitution* 1996, s.169) to try all cases within their specified geographical location. Usually only hear the most serious criminal cases. Also hear appeals from decisions of the lower courts. Decisions of the High Courts are binding on the Magistrates' Courts in their regional jurisdiction. Sit both as the High Courts and as Circuit Courts.

Specialised courts

- Land Claims (*Restitution of Land Rights Act*, 22 of 1994; *Land Reform (Labour Tenants) Act*, 3 of 1996; *Extension of Security of Tenure Act*, 62 of 1997)
- Labour and Labour Appeal (*Labour Relations Act*, 66 of 1995)
- Competition Tribunal and Appeal Court (*Competition Act*, 89 of 1998)
- Income Tax (*Income Tax Act*, 58 of 1962)
- Water Tribunal (*National Water Act*, 36 of 1998)
- Divorce (*Administration Amendment Act*, 9 of 1929; *Divorce Courts Amendment Act*, 65 of 1997)
- Equality (*Promotion of Equality and the Prevention of Unfair Discrimination Act*, 4 of 2000)

Magistrates' Courts

Jurisdiction: General criminal jurisdiction (except for high treason), but may not enquire into or rule on the constitutionality of any legislation, or any conduct of the President (Constitution 1996, s. 170).

Maximum Penalties: Life imprisonment for very serious offences such as rape, murder (*Criminal Law (Sentencing) Amendment Act* 2007); otherwise, 15 years' imprisonment.

Specialised courts

- Sexual Offences (dedicated High Courts)
- Children's (*Children's Act*, 38 of 2005)
- Child Justice (*Child Justice Act*, 75 of 2008)
- Court of the Commissioner of Patents (*South African Patents Act*, 57 of 1978, as amended)
- Copyright Tribunal (*Copyright Act*, 98 of 1978)
- Small Claims Court (*Small Claims Court Act*, 61 of 1984)
- Courts of Chiefs and Headmen (*Black Administration Act*, 38 of 1927)
- Special (Consumer) Courts (*Consumer Affairs (Unfair Business Practices) Act*, 71 of 1988)
- Electoral (*Electoral Commission Act*, 51 of 1996)

III. CHALLENGES TO THE SOUTH AFRICAN CRIMINAL LAW IN THE CONSTITUTIONAL COURT

Since its inception in 1994, the Constitutional Court has held the following aspects of criminal law to be *unconstitutional* :

(i) the imposition of the death penalty (*S. v. Makwanyane*[17]);
(ii) corporal punishment as a judicially-imposed penalty (*S v. Williams*[18]);
(iii) various statutory reverse onuses (*S. v. Zuma*,[19] *S. v. Bhulwana; S. v. Gwadiso*,[20] *S. v. Mbatha; S. v. Prinsloo* ,[21] *S. v. Coetzee*,[22] *S. v. Manamela*[23]);
(iv) legislation prohibiting the possession of indecent or obscene photographic matter (*Case v. Minister of Safety and Security; Curtis v. Minister of Safety and Security*[24]);
(v) the common-law crime of sodomy (*National Coalition for Gay and Lesbian Equality v. Minister of Justice*[25]);
(vi) the summary procedure for scandalising the court (*S. v. Mamabolo*[26]);
(vii) section 49(2) of the *Criminal Procedure Act* 1977,[27] which sets the bounds of justifiable homicide in apprehending a fleeing suspect (*Ex parte Minister of Safety and Security: In re S. v. Walters*[28]);
(viii) a legislative amendment designed to extend minimum sentence legislation to offenders aged 16 and 17 (*Centre for Child Law v. Minister for Justice and Constitutional Development*[29]).

The Constitutional Court has affirmed the *constitutionality* of the following aspects of criminal law:

(i) the ban on corporal punishment laid down in section 10 of the *South African Schools Act* 1996[30] applies to state *and* private schools (*Christian Education South Africa v. Minister of Education*[31]);

17 n.5.
18 [1995] ZACC 6, 1995 (3) SA 632.
19 [1995] ZACC 1, 1995 (2) SA 642.
20 [1995] ZACC 11, 1996 (1) SA 388.
21 [1996] ZACC 1, 1996 (2) SA 464.
22 [1997] ZACC 2, 1997 (3) SA 527
23 [2000] ZACC 5, 2000 (3) SA 1.
24 [1996] ZACC 7, 1996 (3) SA 617.
25 [1998] ZACC 15, 1999 (1) SA 6.
26 [2001] ZACC 17, 2001 (3) SA 409.
27 Act 51 of 1977.
28 [2002] ZACC 6, 2002 (4) SA 613.
29 [2009] ZACC 18, 2009 (2) SACR 477.
30 Act 84 of 1996.
31 [2000] ZACC 11, 2000 (4) SA 757.

(ii) the terms of the minimum sentence legislation contained in the *Criminal Law Amendment Act* 1997[32] (*S. v. Dodo*[33]);
(iii) punishing scandalising the court (*S. v. Mamabolo*[34]);
(iv) the criminality of prostitution *(S. v. Jordan*[35]);
(v) the application of the common purpose (or joint criminal enterprise) rule (*S. v. Thebus*[36]);
(vi) domestic violence protection orders (*Omar v. Government, RSA*[37]);
(vii) the presumption against retrospective operation of rules of criminal law (*S. v. Acting Regional Magistrate, Boksburg*[38]).

The following aspects of criminal law have been *considered* by the Constitutional Court:

(i) the fault basis of criminal liability (*S. v. Coetzee*[39]);
(ii) the offence of being found in possession of stolen property without being able to give a satisfactory account (*Osman v. Attorney-General, Transvaal*[40]);
(iii) the rule (consequent on the abolition of the death penalty, see Part I, *ante*) that prior to the extradition of an accused charged with committing a crime in a foreign State, the South African Government is obliged to secure an assurance or undertaking from the foreign State that the accused will not be subject to the death penalty if extradited (*Mohamed v. President of the Republic of South Africa*[41]);

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32 Act 105 of 1997.
33 [2001] ZACC 16, 2001 (3) SA 382.
34 n.26.
35 [2002] ZACC 22, 2002 (6) SA 642.
36 [2003] ZACC 12, 2003 (6) SA 505; see further Shannon Hoctor, "The State of Common Purpose Liability in South Africa", *post*, 180.
37 [2005] ZACC 17, 2006 (2) SA 289.
38 [2011] ZACC 22, 2012 (1) BCLR 5; see further Part VI.A., *post*.
39 n.22.
40 [1998] ZACC 14, 1998 (4) SA 1224.
41 [2001] ZACC 18, 2001 (3) SA 893. See also the recent Supreme Court of Appeal decision in *Abdi v. Minister of Home Affairs* [2011] ZASCA 2, 2011 (3) SA 37, and the High Court case of *Tsebe v. Minister of Home Affairs; Pitsoe v. Minister of Home Affairs* [2011] ZAGPJHC 115, 2012 (1) BCLR 77. Tsebe has since died, an appeal against the High Court decision has been noted, and an undertaking that the other accused would not be executed if found guilty has not been forthcoming from the Botswana Government: "Botswana / South Africa: Death penalty extradition poser for top court", *Legalbrief Africa* (issue no. 468, Cape Town, February 27, 2012), <http://www.legalbrief.co.za/publication/archives.php?mode=archive&p_id=Legalbrief_Africa&issueno=468&format=html> accessed May 1, 2012.

(iv) the meaning of the phrase "Arbitrary deprivation of property" (*First National Bank of SA Ltd v. Commissioner for the South African Revenue Services*[42]);
(v) interim preservation orders (*N.D.P.P. v. Mahomed NO*[43]);
(vi) the scope of the crime of rape (*Masiya v. DPP, Pretoria*[44];
(vii) the purposes and ambit of criminal confiscation (*Shaik v. The State*[45]).

IV. CRIMINAL PROCEDURE AND EVIDENCE

As reflected in sections V(a), V(b) and VI(b), *post*, legislative reform in the areas of youth justice, sexual offences and sentencing have resulted in a number of important evidentiary and procedural changes to South African law. Other important trends and development are noted here.

South Africa has a single national prosecuting authority, the head of which is appointed by the President.[46] The Supreme Court of Appeal recently reviewed and set aside the President's decision to appoint a person as the National Director of Public Prosecutions. The person in question had been found by a commission of enquiry to have given "misleading and untruthful evidence". The court held that the President had not properly applied his mind to whether the candidate was a "fit and proper person", as required by section 179 of the *Constitution* (*Democratic Alliance v. The President of the RSA*[47]).

In 2008 the practice of detaining prisoners awaiting trial with sentenced prisoners was declared by the Constitutional Court to be an unlawful breach of the detainee's right not to be arbitrarily deprived of their freedom[48] (*Zealand v. Minister for Justice and Constitutional Development and Another*[49]). The Supreme Court of Appeal has clarified the question of when it is allowable to arrest a person without a warrant of arrest, an aspect of South African criminal procedure governed by section 40(1) of the *Criminal Procedure Act* 1977. In *Minister of Safety and Security v. Sekhoto*[50] the court clarified that, once the arresting officer had established jurisdiction, he or she may exercise the discretion to arrest, even where this is not

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42 [2002] ZACC 5, 2002 (4) SA 768; see also, on the meaning of "instrumentality of crime", *N.D.P.P. v. (1) R O Cook Properties (Pty) Ltd; (2) 37 Gillespie Street Durban (Pty) Ltd; (3) Seevnarayan* [2004] ZASCA 36-38, 2004 (2) SACR 208.
43 [2003] ZACC 4, 2003 (4) SA 1 (CC).
44 [2007] ZACC 9, 2007 (5) SA 30; this case is discussed more fully in Part VI.A., *post*.
45 [2008] ZACC 7, 2008 (5) SA 354.
46 *Constitution of the Republic of South Africa* 1996, s.179.
47 [2011] ZASCA 241, 2012 (1) SA 417.
48 *Constitution of the Republic of South Africa* 1996, s.12(1)(a).
49 [2008] ZACC 3, 2008 (4) SA 458.
50 [2010] ZASCA 141, 2011 (5) SA 367.

necessarily the least invasive means of bringing the alleged offender to court.

The SCA has also dealt with statutory search and seizure in two recent cases. In finding that the failure to specify an offence was fatal, in *Minister of Safety and Security v. Van der Merwe*,[51] the court iterated its narrow interpretation of statutory search and seizure provisions, favouring the minimum invasion of the right to privacy.[52] In the case of *Pakule and Tafeni v. Minister of Safety and Security*,[53] the court accepted that, where the grounds for seizure of items under sections 20 and 22 of the *Criminal Procedure Act* 1977 were found to be unreasonable, these could nonetheless be retained by the State if it subsequently transpired that there were other reasonable grounds for lawful seizure. Dealing with the standard of review required in appeal proceedings, the Constitutional Court overruled a decision of the Supreme Court of Appeal not to allow an appeal, based on the SCA's failure to consider the reasons for the court *a quo*'s rulings with respect to various trials within trials (*Qhinga and Others v. S*.[54]).

V. LEGISLATIVE REFORM

Two recent criminal statutes on youth justice and sexual offences have brought about considerable reform in the areas of youth justice and sexual offences in South Africa.

A. Youth justice

One of the most significant shifts in the recent years in the South African criminal justice system is in the treatment of juvenile offenders. Although diversion has informally been a part of the administration of criminal justice in South Africa since the early 1990s, the *Child Justice Act* 2008[55] (which came into operation on April 1, 2010) provides the first comprehensive legislative framework for diversionary procedures.

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51 [2010] ZASCA 101, 2011 (1) SACR 211.

52 *ibid*., [12]. The Constitutional right to privacy in South Africa provides that:

> "Everyone has the right to privacy, which includes the right not to have –
>
> (a) their person or their home searched;
> (b) their property searched;
> (c) their possessions seized; or
> (d) the privacy of their communications infringed."

Any infringement must therefore meet the requirement of the limitations clause, mentioned in Part I, *ante*.

53 [2011] ZASCA 107, 2011 (2) SACR 358.

54 [2011] ZACC 18 (March 15, 2011).

55 Act 75 of 2008.

The Act provides for the potential diversion of *all* youthful offenders between the ages of 10 and 18 (also under 21 in certain circumstances) for *all* crimes. For the purposes of eligibility for diversion, crimes are divided into three schedules, ranging from lesser crimes (such as theft of property under a prescribed value and common assault) in Schedule 1 to the most serious crimes (such as murder, rape and robbery with aggravating circumstances) in Schedule 3.[56] Diversion options are divided into two levels: level one options available for offences listed in Schedule 1, and level two options (including some level one options) available for offences listed in Schedules 2 and 3. A diversion order does not amount to a conviction,[57] but the Director-General of the Department of Social Development must keep a register of children who have been diverted.[58] Children who are not diverted are dealt with in the child justice courts.

A prosecutor may, before a preliminary inquiry has been held, divert a matter involving a child who is alleged to have committed a Schedule 1 crime. A magistrate may divert a matter at the preliminary investigation,[59] and the presiding officer at the trial in the Child Justice Court may divert a matter.[60] Legal representation is provided at the state's expense for alleged child offenders appearing before a child justice court.[61]

The first step in dealing with a child offender is to establish the age of the alleged offender. This is done by a probation officer, under Chapter 5.[62] The Act is directed at children between 10 and 18 years of age, the age of the child at the time of summons, written notice or arrest being crucial for diversion. However, even those who, at the time of summons, written notice or arrest, are aged under 10,[63] or between 18 and 21, are given the possible benefits of the Act.[64] The purposes of assessment include not just an estimate of the child's age, if this is uncertain, but also gathering evidence relating

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56 In the case of a child charged with more than one offence, the most serious offence guides how the matter will be dealt with: *Child Justice Act* 2008, s.6(2).

57 *ibid.*, s.59(1).

58 *ibid.*, s.60(1). There is limited access to this register: *ibid.*, s.60(3).

59 *ibid.*, s.52.

60 *ibid.*, s.67.

61 *ibid.*, s.82.

62 *ibid.*, s.34(1).

63 In terms of s.5(1) of the *Child Justice Act* 2008, every child who is alleged to have committed an offence and who is under the age of 10 years must be referred to a probation officer, and s.9 provides that such child shall not be arrested, but rather handed over to his or her parents, appropriate adult or guardian or, if this is not appropriate, the child should be handed over to a suitable child and youth care centre (s.5(1)(a) and (b)).

64 *ibid.*, s.4(2).

to the prospects of diversion, whether the child is in need of care and protection, whether the child has been used by an adult to commit a crime, whether the child has previous convictions, previous diversions or is subject to pending charges or the formulation of recommendations regarding release, detention or placement of the child. Information collected at the time of the assessment is inadmissible as evidence during any bail application, plea, trial or sentencing process in which the child appears.[65]

The next stage of proceedings is an informal pre-trial inquisitorial procedure (called a "preliminary inquiry" or "PI") before a magistrate, attended by the prosecutor, which must take place within 48 hours of arrest.[66] It must be held in respect of every alleged child offender who is 10 years or older except where the prosecutor dispenses with the PI under chapter 6,[67] where the child's criminal capacity is not likely to be proved[68] or where the matter has been withdrawn.[69] This stage is not in the nature of a trial and need not necessarily take place in court. Information obtained at the inquiry may not be used against the child in any other proceedings, but there is no similar protection for victims or witnesses. The child, the child's parent (or appropriate adult or guardian) and the probation officer must attend the inquiry.[70]

There is no specific requirement for legal representation, although the Act provides that "[n]othing in this Act precludes a child from being represented by a legal representative at a preliminary inquiry"[71] and the "inquiry magistrate may permit the attendance of any other person who has an interest in attending and who may contribute to the proceedings"[72] and must "inform the child of his or her rights".[73] Bearing in mind the nature of the information collected and the decisions to be made at the PI regarding capacity (and other possible aspects of criminal liability), acknowledgement of responsibility, and diversion options, it is arguable that legal representation of the alleged child offender at the preliminary inquiry is crucial for the just and fair administration of justice and protection of due process rights.

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65 *ibid.*, s.36(1)(b).

66 Postponements of the preliminary inquiry may be permitted for a period of up to 14 days in special circumstances: *ibid.*, s.48.

67 See *post*.

68 It may be very difficult to assess whether criminal capacity is likely or not likely to be proved without the benefit of a traditional criminal trial, *i.e.* defence version, expert witnesses or cross-examination.

69 Under the *Child Justice* Act 2008, s.5(3)(a)-(b).

70 *ibid.*, s.44(1). However, the inquiry may proceed in the absence of the child's parent, guardian or appropriate adult in certain circumstances: *ibid.*, s.44(4).

71 *ibid.*, s.81.

72 *ibid.*, s.44(5).

73 *ibid.*, s.47(2)(iii).

An inquiring magistrate must explain the purpose and inquisitorial nature of the PI to the child, the nature of the allegation against him or her, and inform the child of his or her rights. The assessment report is considered at the preliminary inquiry, which must establish whether the matter can be diverted and, if so, the suitable diversion option.

There are various pre-requisites for diversion: acknowledgement of responsibility for the offence;[74] that the child has not been unduly influenced to acknowledge responsibility;[75] that there is a prima facie case against the child;[76] that the child and, if available, his or her parent, guardian or appropriate adult, consent to diversion;[77] and that the prosecutor indicates that the matter may be diverted.[78]

The *Child Justice Act* 2008 stipulates that, in addition to these pre-requisites for diversion, where an accused child is 10 years or older, but under 14 years old, the prosecutor must be satisfied that criminal capacity is "likely to be proved in terms of section 11".[79] If capacity is not likely to be proved, then the child will be treated as if he or she were aged under 10 years.[80]

Under section 10, a prosecutor is required to consider a variety of factors in determining whether to prosecute, but the prosecutor who decides not to divert is not obliged to give reasons for non-diversion, although any reasons should be recorded in the investigatory diary of the docket.[81] Prosecutorial directives[82] identify circumstances when diversion of matters before a preliminary inquiry should not take place.

If the child ultimately fails to comply with a diversion order, this failure will constitute an acknowledgement of responsibility under section 220 of the *Criminal Procedure Act* 1977.[83] However, a Child Justice Court that makes a diversion order must warn the child that any failure to comply with the diversion order may result in an acknowledgement of responsibility being recorded as an admission in the event of trial.[84] Furthermore, a requirement of diversion is that the child not be unduly influenced in acknowledging responsibility.[85] Despite these provisos, infringements of the presumption of innocence, the right to remain silent and freedom from self-incrimination may result.

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74 *ibid.*, s.52(1)(a).
75 *ibid.*, s.52(1)(b).
76 *ibid.*, s.52(1)(c).
77 *ibid.*, s.52(10(d).
78 *ibid.*, s.52(1)(e).
79 *ibid.*, s.41(1)(b).
80 See n.63, *ante*.
81 *Child Justice Act 2008: Directives in terms of s.97(4)* (Government Notice R.252, *Government Gazette* 33067, March 31, 2010), [F.4].
82 *ibid.*, [G.6].
83 *Child Justice* Act 2008, s.58(4)(b).
84 *ibid.*, s.67(1)(b).
85 *ibid.*, s.52(1)(b).

Where failure to comply with a diversion order is due to the child's fault, the prosecutor may proceed with the prosecution or the magistrate or child justice court may issue a warrant of arrest for the child, record the acknowledgement of responsibility as an admission, and proceed with the trial.[86] It appears that the relevant officials also have the option of not invoking the criminal process, but rather selecting a more onerous diversion option.[87] If, however, the diversion programme is complied with, a prosecution on the same facts may not be instituted.[88] A diversion order does not constitute a previous conviction,[89] and a private prosecution may not be instituted against a child who has been "diverted" in terms of the Act.[90]

In the case of Schedule 2 offences, the views of the victim or other persons with a direct interest in the matter and the investigating officer must also be consulted. In the case of Schedule 3 offences, the appropriate Director of Public Prosecutions must indicate in writing that the matter be diverted, and then only if "exceptional circumstances" exist. These "exceptional circumstances" are identified in directives made under section 97(4) of the *Child Justice Act* 2008.[91]

Diversion options are set out in section 53 of the *Child Justice Act* in two levels: Level one options applying to Schedule 1 offences, and level two options applying to all other offences referred to in Schedules 2 and 3. Some level one options are also available to Schedule 2 and 3 offences.

Level one options, for Schedule 1 offences, are: (a) apology; (b) formal caution, with or without conditions; (c) placement under supervision and guidance order; (d) placement under reporting order; (e) compulsory school attendance order; (f) family time order; (g) peer association order; (h) good behavior order; (i) order prohibiting a child from appearing at a specific place; (j) referral for counseling or therapy; (k) compulsory attendance at a specified centre or place for a specified vocational, educational or therapeutic purpose; (l) symbolic restitution; (m) restitution of a specified object to a specified person; (n) community service; (o) provision of some service or benefit by the child to a specified victim; (p) payment of compensation; and (q) where there is no identifiable person to whom restitution may be made, the provision of some service, benefit, or payment of compensation to a community, charity or welfare organisation. The duration of such a diversion option should not

86 *ibid.*, ss.58(1) and (4).
87 *ibid.*, s.58(4)(c).
88 *ibid.*, s.59(1).
89 *ibid.*, s.59(*b*).
90 *ibid.*, s.59(2).
91 *Child Justice Act 2008 Directives* 2010 (n.81), [J].

exceed 12 months for a child under 14, and 24 months for a child of 14 years or older.

Level two options for Schedule 2 and 3 offences are: (i) options (j) to (q) above; (ii) compulsory attendance at a specified place for a specified vocational, educational or therapeutic purpose, which may include a period of temporary residence; (iii) referral to intensive therapy, which may include a period of temporary residence; and (iv) placement under the supervision of a probation officer on conditions which may include restriction of the child's movement. The duration of such a diversion option should not exceed 24 months for a child under 14, and 48 months for a child over 14 years of age.

Apart from the level of diversion option, certain factors can be taken into consideration in selecting the appropriate form of diversion: the child's cultural, religious and linguistic background; educational level, cognitive ability, domestic and environmental circumstances; proportionality of the option to the circumstances of the child, nature of the offence and interests of society; and child's age and developmental needs.

The *Child Justice Act* stipulates minimum standards for, and accreditation and monitoring of, diversion programmes.[92]

The Act provides for family group conferences and victim-offender mediation, where victim and child offender consent.[93] Family group conferences can be attended by the child and parent; any person requested by the child; the victim; the probation officer; the prosecutor; any police official, or member of the community; and any person authorised by the family group facilitator.[94]

For child offenders who are not diverted, Chapter 10 of the *Child Justice Act* lays down rules relating to victim impact statements and pre-sentence reports, and sets out principles governing the sentencing of child offenders convicted by a child justice court. Various sentencing options (which may be used in combination[95]) are listed: community-based sentences; restorative justice options; fines or alternatives to fines; correctional supervision; compulsory residence in child and youth care centres; imprisonment; and postponement or suspension of sentence.

As far as imprisonment is concerned, section 77(1) of the *Child Justice Act* provides that a child justice court "may not impose a

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92 *Child Justice Act* 2008, ss.55, 56 and 57, respectively.

93 *ibid.*, ss.61 and 62.

94 These conferences are intended to be less intimating for a child than a criminal trial and, in the context of less serious offences such as theft, this might be so. However, without a legal adviser representing the child (especially in alleged serious offences) and confronted with the victim and an array of state officials, the child might well find the proceedings rather more intimidating than is anticipated.

95 *Child Justice Act* 2008, s.69(2).

sentence of imprisonment on a child who is under the age of 14 years at the time of being sentenced for the offence; and when sentencing a child who is 14 years or older at the time of being sentenced for the offence, must only do so as a measure of last resort and for the shortest appropriate period of time".

The diversion of young offenders out of the criminal justice system into rehabilitative programmes based on reintegration and reconciliation offers considerable benefits in alleviating existing pressure on an overloaded criminal justice and prison system.[96] The restorative justice advantages of diverting offenders of crimes listed in Schedules 1 and 2 of the *Child Justice Act* are, however, more obvious than in the case of Schedule 3 offences.

It is submitted that the *Child Justice Act*'s noble objectives of restorative justice can only be attained if applied correctly. Clear legal limits must be placed on the wide prosecutorial discretion to divert; legal representation for children in conflict with the law at all stages of the process should be facilitated; sufficient attention must be paid to the due process rights of children (such as the right to remain silent and freedom from self-incrimination); considerable resources must be directed to achieving the effectiveness of the diversionary options; and the legitimate concern of society about proportionality between the offence and its consequences for the offender, especially in the context of the more serious offences, must be accommodated.

B. Sexual offences

Another sweeping legislative change in South African criminal law was effected by the *Criminal Law (Sexual Offences and Related Matters) Amendment Act* 2007,[97] which entered into force on December 16, 2007.

Prior to May 10, 2007, rape in South Africa was defined as unlawful and intentional sexual intercourse with a woman without her consent. In May 2007 the Constitutional Court extended the definition to include penetration with a penis into the anus of a woman (electing not to confirm a lower court decision that had extended the definition of rape to anal penetration of both men and women)(for further discussion of this case see Part VI.A., *post*).[98] On December 16, 2007, *SORMA* repealed the common law definitions of rape, indecent assault, bestiality, incest and sexual violation of a

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[96] It is possible that diversion could lead to "net-widening" rather than "net-narrowing". Under the pre-legislation system, a child who could merely receive a warning from a police officer for committing a minor offence may now be diverted into a diversionary programme: Lucas Muntingh, *Policing the Transformation* (ISS Monograph, April 1977), 70-1.

[97] Act 32 of 2007, hereinafter, "*SORMA*" or "the new sexual offences Act".

[98] *Masiya v. Director of Public Prosecutions, Pretoria* [2007] ZACC 9; 2007 (5) SA 30.

corpse,[99] replacing them with statutory offences and introducing a range of new sexual offences. The definition of rape in South Africa has now effectively been extended through section 3 of *SORMA* to include both men and women and to cover a range of penetrative acts. Rape in South African is now defined as follows:

> "Any person ('A') who unlawfully and intentionally commits an act of sexual penetration with a complainant ('B') without the consent of B, is guilty of the offence of rape."

Sexual penetration is defined in section 1 to include insertion of a penis into a vagina, anus or mouth, or penetration of an object into the vagina or anus. The Act also provides for an offence of sexual assault, with the *actus reus* of sexual violation.[100] Sexual violation is very broadly defined to include conduct ranging from touching another's genitals, anus or breasts, directly or indirectly, to kissing.[101] In respect of both rape and sexual assault, *SORMA* creates offences predicated on compulsion, in which the offender compels a third person to commit the act of sexual penetration or sexual violation with another person, without the consent of either party.[102]

These offences all require the prosecution to prove that the complainant did not consent to the conduct in question. Consent is defined in section 1(2) of the Act to mean "voluntary or uncoerced agreement", with an open list of coercive circumstances that include:

- force or intimidation, or the threat of harm, by the accused against the complainant, another person, or their property;
- abuse of power or authority by the accused to the extent that the complainant felt unable to indicate their unwillingness or resistance to the sexual act;
- sexual acts committed under false pretences, including *error in persona* and *error in negotium*; and
- incapacity to consent, because the complainant was asleep, unconscious, in an altered state of consciousness to the extent that their judgement was impaired (the Act refers to such influences as medicine, drugs, and alcohol), as well as where a child is under the age of 12 or the person is mentally disabled.

The Act provides for consensual sexual penetration (statutory rape) and consensual sexual violation (statutory sexual assault) in section 15 and 16 respectively. These provisions deal with sexual activity occurring between the ages of 12 and 16 years, which is set as the age of consent.[103] While section 56(2)(b) offers a defence to a

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99 *SORMA*, s.68(1)(b).
100 *ibid.*, s.5, read with the definition of "sexual violation" in s.1.
101 *ibid.*, s.1.
102 *ibid.*, ss.4 and 6.
103 *ibid.*, s.1(1)(b).

charge under section 16 (statutory sexual assault) where the age gap between parties is no more than 2 years, there is no such defence to a charge of statutory rape (s.15). This anomaly forms the basis of a case currently pending before the North Gauteng High Court, in which two child welfare organisations are arguing for the extension of the two-year defence to cases involving consensual sexual intercourse between children under the age of 16.[104] In respect of both offences, where the parties were both under 16 years at the time, the Act specifies that, where a prosecution is instituted, both children must be charged.[105]

Sex work is outlawed in South Africa by way of the *Sexual Offences Act* 1957.[106] The Constitutional Court affirmed the constitutionality of this prohibition in the 2002 case of *S. v. Jordan.*[107] *SORMA* amended the 1957 Act to apply only to persons over the age of 18 years, and introduced extensive provisions to deal with child prostitution and to criminalise the conduct of those facilitating, purchasing and benefitting from child prostitution.[108] For the first time in South Africa, *SORMA* also purports to criminalise the act of purchasing sex from an adult "for financial reward, favour or compensation".[109] However, it is not clear whether this constitutes an offence in South Africa, as the provision fails to establish a clear criminal norm, or to stipulate the nature and extent of penalties.

Trafficking for sexual purposes is dealt with via transitional provisions, while Parliament continues to consider a Bill dealing more comprehensively with the problem.[110] There are overlapping provisions dealing with trafficking in children and related exploitative practices, including forced labour.[111] Another overlap with the Children's Act is the introduction of offender registers. *SORMA* makes provision for all sex offenders' details to be captured in a national register.[112] The primary purpose of the sex offender register is to limit the possibility of sex offenders working with children and other vulnerable groups. In this regard, although narrower in ambit,

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104 *Teddy Bear Clinic and RAPCAN v Minister of Justice*, case no. 73300/10. See also D. McQuoid-Mason "Mandatory reporting of sexual abuse under the *Sexual Offences Act* and the 'best interests of the child'" (2011) 4 (2) South African Journal of Bioethics and Law 74-78.

105 Sections 15(2)(a) and 16(2)(a) respectively. In respect of statutory rape, the decision lies with the National Director of Public Prosecutions. Statutory assault prosecutions are authorised by a Director of Public Prosecutions (that is, at provincial level).

106 Act 23 of 1957. Section 20(1A)(a) criminalises the act of selling sex.

107 *S. v. Jordan* 2002 (6) SA 642 (CC).

108 *SORMA*, s.17.

109 *ibid.*, s.11.

110 The *Prevention and Combatting of Trafficking in Persons Bill* 7 of 2010 was introduced into Parliament in March 2010.

111 *Children's Act* 38 of 2005, Ch. 18.

112 *ibid.*, Ch. 6.

it overlaps with the National Child Protection Register established under the *Children's Act*, which requires a record to be kept of all children who are abused, the names and details of those convicted, and the findings of any related Children's Court enquiries. This Register also serves as a record of people who are "unsuitable to work with children", including people who have been convicted of murder, attempted murder, rape, indecent assault or assault with intent to cause grievous bodily harm involving children, or who have not been convicted on one of these charges because they were found to either have lacked criminal capacity at the time of the offence, or the capacity to stand trial.[113] Questions have been raised about the utility of maintaining such registers in a country where the vast majority of sexual offences are not reported or prosecuted.[114]

Reflecting concerns regarding the nexus of sexual violence and HIV transmission in South Africa, *SORMA*makes provision for post-exposure prophylaxis to prevent HIV infection (PEP) to be provided to victims at state expense.[115] A victim must report to either a police station or to a "designated health facility" in order to receive treatment, but does not need to make a criminal complaint.[116] Complainants, police and prosecutors may also apply for compulsory HIV testing of alleged sex offenders.[117] While ostensibly supportive of victims' rights, the provision has been criticised as inimical to public health messaging and epidemiological knowledge on transmission and safe sex practices following possible exposure.[118]

A number of procedural and evidentiary amendments were introduced or affirmed in South African law via *SORMA*.

(i) Rape, compelled rape, trafficking in persons for sexual purposes and using a child or mentally disabled person for pornographic purposes are included as acts for which the right to institute a prosecution does not prescribe.[119] The Constitutional Court has recently found that a delay of

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113 *ibid.*, Ch. 7.

114 R. Le Roux, J. Williams, "Sections 40-53: National Register for Sex Offenders" in D. Smythe, B. Pithey (eds), *Commentary on Sexual Offences* (loose leaf, Juta 2011), ch. 17; Y. Hoffman-Wanderer, "Sentencing and Management of Sexual Offenders", in L. Artz, D. Smythe (eds), *Should we Consent?: Rape Law Reform in South Africa* (Juta 2008), 224-261.

115 *SORMA*, s.28(1).

116 *ibid.*, s.28(2).

117 *ibid.*, ss.30-39. See S. Roehrs, "Sections 30-39: Compulsory HIV testing of alleged sex offenders", in Smythe, Pithey (eds) (n.114).

118 S. Roehrs "Implementing the Unfeasible: Compulsory HIV Testing for Alleged Sexual Offenders" (2007) 22 South African Crime Quarterly 27-32; S. Roehrs, "Privacy, HIV/AIDS and public health interventions" (2009) 126 South African Law Journal 360; S. Chisala "Rape and HIV/AIDS: Who's Protecting Whom?" in Artz, Smythe (eds) (n.114), 52-71.

119 Through an amendment to s.18(f) of the *Criminal Procedure Act* 1977.

39 years in instituting a private prosecution for child sexual abuse was not unreasonable given the nature and seriousness of the offence.[120]

(ii) An exception to the general exclusionary rule to allow for the admission of previous consistent statements in sexual offences cases.[121]

(iii) An injunction against inferences drawn solely from the absence of previous consistent statements.[122]

(iv) The proscription of adverse inferences drawn solely from the length of a delay between the alleged commission of an act and the reporting thereof.[123]

(v) The express abolition of the cautionary rule as it pertains to sexual offences.[124]

(vi) The exclusion of character evidence and evidence of previous sexual history, except on application to the court, which must take into account whether its admission:

(a) is in the interests of justice, with due regard to the accused's right to a fair trial;

(b) is in the interests of society in encouraging the reporting of sexual offences;

(c) relates to a specific instance of sexual activity relevant to a fact in issue;

(d) is likely to rebut evidence previously adduced by the prosecution;

(e) is fundamental to the accused's defence;

(f) is not substantially outweighed by its potential prejudice to the complainant's personal dignity and right to privacy; or

(g) is likely to explain the presence of semen or the source of pregnancy or disease or any injury to the complainant, where it is relevant to a fact in issue.[125] Where the court is of the view that the purpose of leading such evidence is to support an inference that "by reason of the sexual nature of the complainant's experience or conduct", the complainant is "is more likely to have consented to the offence being tried" or

120 *Bothma v. Els and others* [2009] ZACC 27, 2010 (2) SA 622.

121 *SORMA*, s.58.

122 *ibid.*

123 *ibid.*, s.59.

124 *ibid.*, s.60. South Africa retains the cautionary rule as it pertains to single witnesses and child witnesses; see P.J. Schwikkard, "Chapter 23: Sections 58-60 and amendment in terms of s.68(2)", in Smythe, Pithey (eds) (n.114).

125 *Criminal Procedure Act* 1977, s.227(5).

"is less worthy of belief" the Act specifies that the evidence must be excluded.[126]

(vii) A requirement for reasons to be given where the court refuses an application for an intermediary to assist a complainant who is under 14 years old.[127] The exercise of discretion in whether to appoint an intermediary was found to be constitutionally sound in the case of *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development and Others*.[128]

(viii) A requirement for the court to record reasons when refusing an application for a child under 14 years to give evidence via closed circuit television.[129]

VI. CASE LAW COMMENTARY

A. The principle of legality

In 2007, the Constitutional Court became embroiled in a debate on the principle of legality in *Masiya v. Director of Public Prosecutions*.[130] The debate centred around two components of the principle as it applies in criminal justice: first, criminal laws must have a prospective operation, there can be no punishment imposed retrospectively;[131] secondly, courts should not develop the definitions of crimes.[132] To understand the implication of this judgment on the principle of legality, a brief restatement of the facts of the case is necessary.

The accused had been convicted in the magistrates' court for the rape of a 9-year-old girl, in that he unlawfully and intentionally anally penetrated the girl without her consent. At the time the case was heard, this conduct would have fallen under the rubric of sexual assault, not rape. The magistrate nonetheless convicted him of rape, on the ground that the common law definition of rape was unconstitutional, which conviction the High Court upheld.[133] The

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126 *ibid.*, s.227(6).

127 *ibid.*, s.170A(7).

128 [2009] ZACC 8; 2009 (4) SA 222, overturning the lower court finding of unconstitutionality in *S. v. Mokoena* [2008] ZAGPHC 148, 2008 (5) SA 578.

129 *Criminal Procedure Act* 1977, s.158(5).

130 [2007] ZACC 9, 2007 (5) SA 30 (n.44).

131 Jonathan Burchell, *Principles of Criminal Law* (3rd edn, originally published 2005, revised reprint, Juta 2006), 96-104.

132 This rule is extrapolated from the following two components of the principle of legality: crimes and their punishments must be created by a properly made law explicitly identifying the conduct as a crime; and the definition of the common law and statutory crimes should be reasonably precise and settled: Burchell, *ibid.*; C.R. Snyman, *Criminal Law* (5th edn, LexisNexis Butterworths 2008), 39-44.

133 *S. v. Masiya* [2006] ZAGPHC 69, 2006 (2) SACR 357. For further discussion of this case, see J. Burchell, *South African Criminal Law and Procedure* (4th edn, Juta 2011), vol. 1, "General Principles of Criminal Law", 37-42; K. Phelps

common-law definition of rape was thus developed along more gender-neutral lines.[134] The matter was then referred to the Constitutional Court for confirmation.[135]

The Constitutional Court declined to confirm the High Court's order. The majority, in a judgment delivered by Nkabinde J.,[136] found that the common-law definition of rape was not unconstitutional, insofar as it criminalised conduct that was clearly morally and socially unacceptable.[137] Nonetheless, the definition was found to fall short of "the spirit, purport and objects of the Bill of Rights", and to require adaptation.[138] It was therefore developed incrementally to include "acts of non-consensual penetration of a penis into the anus of a female".[139]

In terms of the principle of legality, the focus of the majority judgment in *Masiya* is clearly on the prohibition of the retrospective application of the law. The court rightly avoids falling foul of this rule by deciding not to apply their extension of the definition of rape to the accused. However, there is little depth of discussion provided in the judgment on whether the principle permits the development of common-law definitions of crimes. The court cannot have viewed this aspect of the principle as problematic, as it indeed developed the definition of rape to include the anal penetration of females. Therefore, despite failing to substantiate the courts' ability to develop common-law crimes, the judgment in *Masiya* inherently acknowledges that such development does not infringe the principle of legality.

This principle has always permitted courts to develop the scope of common-law crimes by recognising behaviour that had not previously been recognised within the established definition.[140] Without this ability, the law would be rendered irrelevant in changing modern society: "The law grows and develops as time passes; it does not stand still".[141] For example, the common-law definition of theft now includes the theft of credit, despite the fact that this type of theft had

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"A dangerous precedent indeed – A response to C.R. Snyman's note on *Masiya*" (2008) 125 South African Law Journal 648; K. Phelps, S. Kazee "The Constitutional Court gets anal about rape – gender neutrality and the principle of legality in *Masiya v. D.P.P.*" (2007) 20 South African Journal of Criminal Justice 341.

134 *Masiya* (n.130), [2]. The High Court redefined the common law definition of rape to include "acts of non-consensual sexual penetration of the male penis into the vagina or anus of another person". Prior to this the common law definition of rape was "the unlawful and intentional sexual intercourse with a woman without her consent".

135 Under s.172(2)(a) of the *Constitution of the Republic of South Africa* 1996.

136 With whom Moseneke D.C.J., Kondile A.J., Madala J., Mokgoro J., O'Regan J., Van der Westhuizen J., Yacoob J. and Van Heerden A.J. concurred.

137 *Masiya* (n.130), [27].

138 *ibid.*, quoting the injunction in s.39(2) of the *Constitution*.

139 *ibid.*, [74].

140 Phelps, Kazee (n.133), 353-354; J. Burchell (n.133), 40-42.

141 *S. v. Burger*, 1975 (2) SA 601 (Supreme Court of South Africa, Cape Division), 616.

not previously been recognised within the definition of theft, as the notion of credit did not exist when the definition was originally formulated.[142] The same argument applies to the crime of defeating or obstructing the course of justice. The notion of a police service did not exist when the definition of this crime was first established; nonetheless, courts have seen fit to recognise obstruction of the police within the boundaries of the common-law definition of defeating or obstructing the course of justice, despite the fact that this offence was initially confined only to judicial proceedings.[143]

The decision in *Masiya* is significant in that it inherently recognises a new ground on which the Court may develop the definition of crimes other than to keep the law relevant – that is, where the existing definition is unconstitutional. In this way, the common law grows, in the spirit of the Constitution, within the existing framework of crimes. If behaviour cannot legitimately fit under an existing common-law crime, and the offence as currently defined is

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[142] Snyman (n.132), 45. The Appellate Division of the Supreme Court of South Africa stated in *R. v. Solomon* 1953 (4) SA 518, 522: "It must be borne in mind that, under our modern system of banking and paying by cheque or kindred process, the question of ownership in specific coins no longer arises in cases where resort to that system is made". Reference is made to this and other similar decisions in *S. v. Graham* 1975 (3) SA 569 (Supreme Court of South Africa, Appellate Division), 577:

> "The foregoing decisions have not escaped academic criticism, but they stand as judgments of this Court. They were referred to in the arguments in the instant case without criticism and I need say no more than that I am unpersuaded that they are manifestly wrong. They are therefore binding."

[143] In *Burger* 1975 (n.141), 616, Baker J. explicitly reasons that adapting a crime to modern circumstances does not offend the principle of legality:

> "What is of importance are the principles enumerated in the cases, not the specific instances of the offence of defeating or obstructing the course of justice... The law grows and develops as time passes; it does not stand still. Since the time of the Roman-Dutch writers great developments have taken place in the field of criminal law. One of the most important of these is that we today have appointed civil servants whose duty it is to investigate alleged offences; and to see to it that they are properly tried in public… It is as equally serious to prevent an investigation from taking place as it is to attempt to influence the investigation after it has commenced, or to attempt to influence the course of a trial in order to obtain the accused's acquittal. All three types of conduct materially amount to the undermining of the course of justice."

His judgment was applied with approval by Macdonald C.J. in *S. v. Greenstein* 1977 (3) SA 220 (High Court of Rhodesia, Appellate Division), 224:

> "These processes have undergone fundamental changes since Roman times and, while the basic principles underlying the offence remain unaltered, they must necessarily be applied in very different circumstances at present… In modern systems of law, the administration of justice, has with the development of police forces, become increasingly involved in the investigation and prevention of crime."

constitutional, then it is up to the legislature to intervene. This approach ensures both the adoption of constitutional supremacy in South Africa, as opposed to parliamentary sovereignty; and that the injunction in section 39(2) of the *Constitution* – that "when developing the common law … every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights" – is not rendered lip service.

This approach to the principle of legality, particularly in the Courts' development of the common law, does not breach the separation of powers. Rather, it is a division of labour that is in keeping with the conception of the separation of powers in South Africa as a "constitutional dialogue"[144] – each arm of the State acts as a check on the others. The legislature remains free to intervene, should it find that the court erred in its interpretation of common-law crimes. This collaborative and co-operative model is meant to encourage legitimacy in the functioning of the State: "A different conception [of the separation of powers] is needed which emphasises the need to develop a culture of openness, responsiveness and justification in the interchange between the different branches of government".[145]

The Constitutional Court's strict adherence to the rule against retrospective application of the law was recently reinforced in *S. v. Acting Regional Magistrate, Boksburg*.[146] This case concerned the interpretation of statutory provisions regulating the transition from the common law crime of rape to the new statutory regime under *SORMA* (discussed in Part V.B., *ante*). Section 68 of *SORMA* repeals the common law offence of rape, while section 69 governs the transition from the common law to the statutory offence. The accused's counsel raised an objection before pleading, reasoning that, taken together sections 68 and 69 created a lacuna in the law: the wording of the sections precluded "the prosecution of common law crimes *committed* before the commencement of the Act but *reported* or *investigated* afterwards"[147]. In other words, the accused contended that the transitional provisions only covered those cases in which criminal proceedings or investigations had commenced before *SORMA* was brought into force, but did not cover crimes *committed* before SORMA was commenced, but only investigated or prosecuted after the Act came into force. Accordingly, it was argued, the offending portions of the Act should be declared unconstitutional, as they violated the rights in sub-sections 12(1)(c)[148] and (e),[149]

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144 M. Chaskalson *et al.*, *Constitutional Law of South Africa* (1999) [41-9], [41-10]; Phelps, Kazee (n.133), 354.

145 Chaskalson *et al.*, *ibid.*, 41-48.

146 [2011] ZACC 22, 2012 (1) BCLR 5 (n.38).

147 *ibid.*, [11] (emphasis added).

148 Freedom from violence from either public or private sources.

12(2)(b)[150] and 28(1)(d)[151] of the Constitution. The High Court agreed with this line of reasoning, ordered severence of the offending provisions, and issued an order of constitutional invalidity. The order was referred to the Constitutional Court for confirmation.

In essence, the question before the court was whether the Act repeals the common law crime of rape retrospectively.[152] The court took this opportunity to restate the common law presumption against retrospectivity: "It is presumed that a statute does not operate retrospectively, unless a contrary intention is indicated, either expressly or by clear implication".[153] It then held that *SORMA* did not in fact require interpretation or a declaration of invalidity: "(g)iven its plain meaning, the section does not apply to prosecutions not yet instituted".[154] It would at best be strained to interpret the Act as intending to rebut the presumption that the State is capable of prosecuting, under the common law, cases of rape that occurred before the Act was commenced. This interpretation would fly in the face of the purpose of the Act, apparent from the long title, preamble and objects of the Act. It would also undermine the protection that the Constitution affords "against all violence, and in particular sexual violence against vulnerable children, women and men".[155]

The court therefore concluded that "...it is inconceivable that the provision could exonerate and immunise from prosecution acts that violated these interests. It follows that the High Court's declaration of constitutional invalidity cannot be confirmed, and that the accused person could and should have been charged under the common law".[156] The court thus refused to accept an interpretation of section 69 that would endorse retrospective application of the Act. This decision has been applied with approval in *S. v. le Roux*.[157]

The Supreme Court of Appeal also recently contributed to the discussion of the principle of legality in *Bula and Others v. Minister of Home Affairs and Others*.[158] This case involved an appeal against a judgment of the South Gauteng High Court, Johannesburg, in which an application by 19 Ethiopian nationals (the appellants) was dismissed. The appellants had applied, unsuccessfully, for an order setting aside an order of the magistrates' court extending warrants of

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149 The prohibition of cruel, inhuman or degrading treatment or punishment.
150 The right to security in, and control over, one's body.
151 The prohibition of torture.
152 *S. v. Acting Regional Magistrate, Boksburg* (n.146), [15].
153 *ibid.*, [16] (footnote omitted).
154 *ibid.*, [19].
155 *ibid.*, [23].
156 *ibid.*, [23].
157 [2011] ZAWCHC 367 (1 September 2011).
158 [2011] ZASCA 209, [2012] 2 All SA 1.

detention; preventing their deportation by the Department of Home Affairs until their status under the *Refugees Act* 1998[159] was finally and properly determined; allowing them to approach a refugee reception centre to apply for asylum; and issuing them with a temporary asylum seeker's permit, in accordance with section 22 of the *Refugees Act* 1998. None of the above mentioned relief had been granted.

The appellants contended that, in May 2010, in fear for their lives, they had fled Ethiopia to escape political persecution. After travelling for about a year, they had crossed the South African border with Mozambique, without the knowledge of border officials.[160] Upon their arrival in South Africa, they had met a Somali national who offered them assistance. Accordingly, they had gone to the Somali national's abode, where a fight had broken out between two Somalis, prompting the police to arrive. When the appellants could not produce legal documentation, they were arrested as "illegal foreigners", and eventually detained at a holding facility and repatriation centre controlled by the Department of Home Affairs.[161] Their attorney then wrote to the Department, demanding that deportation proceedings be halted and that they be released in order to apply for asylum in South Africa, as permitted under the *Refugees Act*. Having received no response from the Department, the appellants applied to the South Gauteng High Court for relief.[162]

The Supreme Court of Appeal, in a decision issued by Navsa J.A., criticised heavily the manner in which the High Court proceedings had been conducted. Navsa J.A. quoted extensively from these proceedings, illustrating the complete disregard the Judge in that court had shown for the rules of evidence and procedure, as well as for the proper role and conduct of a judge in court proceedings generally. Furthermore, he found that, on a proper understanding of the *Refugees Act*, the government was denying the appellants their rights under that Act, and was therefore not abiding by its constitutional and international law obligations.

The Supreme Court of Appeal stated from the outset that "this appeal is about the principle of legality".[163] Specifically, the aspect of the principle of legality, "an incident of the rule of law, [that] dictates that officialdom in all its guises must act in accordance with legal prescripts".[164] In deciding that "in the present case that principle was breached in more ways than one",[165] the court emphasized the

159 Act 130 of 1998.
160 *Bula v. Minister of Home Affairs* (n.158), [4].
161 *ibid.*, [5] and [6].
162 *ibid.*, [6] and [7].
163 *ibid.*, [2].
164 *ibid.*, [79]
165 *ibid.*

words of the Constitutional Court in *Fedsure*:[166] "It seems central to the conception of our constitutional order that the Legislature and the Executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law". This sentiment has also been recently echoed by the court in the context of minimum sentencing legislation (see Part VI.B., *post*).

B. Punishment

Until 1997, sentencing in South Africa was governed by rules developed through case law. In the seminal sentencing case of *Zinn*,[167] three main concerns in sentencing were acknowledged: in reaching a just sentence, the court should balance the seriousness of the offence, the interests of the offender, and the interests of society. This formula has become known as the "*Zinn* triad".[168] It is clear that, under this system of sentencing, judges have exercised broad discretion in fashioning appropriate sentences. It is thus unsurprising that, when the government introduced the *Criminal Law Amendment Act* 1997 (the mandatory minimum sentencing Act), many judges perceived it as an unwarranted restriction on their discretion.

The 1997 Act was originally intended to be a temporary measure, until proper research and consultation could be conducted in producing a permanent version, and it included a two-year sunset clause. Unfortunately, every time the two-year period expired, the government simply extended it for a further two years, even in the face of vociferous cross-sector criticism of the Act and research showing that it was having a disastrous effect on prison over-crowding.[169] In 2008, the Act was amended to remove the sunset clause. It is now a permanent feature on the statute books, although there is renewed speculation that the Department of Correctional Services may review it.[170]

From the government's perspective, the Act was passed as a response to growing public punitiveness in the face of the abolition of the death penalty,[171] as well as a response to criticism that sentencing in South Africa lacked consistency, due to wide judicial

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166 *Fedsure Life Assurance Ltd and others v. Greater Johannesburg Transitional Metropolitan Council and others* [1998] ZACC 17, 1999 (1) SA 374, [58].

167 *S. v .Zinn* 1969 (2) SA 537 (Supreme Court of South Africa, Appellate Division).

168 *ibid.*, 540G-H: The main consideration in sentencing is "the triad consisting of the crime, the offender and the interests of society".

169 See statistics in Part I, *ante*.

170 See Part I, *ante*.

171 *S. v. Makwanyane* [1995] ZACC 3, 1995(3) SA 391 (n.5).

discretion. Like cases were not being sentenced alike.[172] However, the government's unwillingness to engage in dialogue with the judiciary and other role-players on their reservations about the Act unfortunately led to a situation where some members of the judiciary began interpreting the Act to try to address their perceived concerns. These efforts focused on section 51(3).

This section provides for judicial discretion to deviate from the statutorily defined sentences in cases where there are substantial and compelling circumstances. It was deemed necessary to include such discretion in order to prevent a breach of the separation of powers. Unfortunately, in the original Act, the government did not provide any guidance on the meaning of the phrase "substantial and compelling circumstances", and this left such decisions to judicial discretion. The interpretation of this phrase, in certain cases, was arguably used as a means of showing resistance to the Act. This meant that, for a period, the Act had the effect of worsening consistency in sentencing rather than encouraging it.[173]

The Supreme Court of Appeal intervened in the case of *Malgas*.[174] It enumerated a number of guiding factors that future courts should take into account when sentencing under the Act. The main message to emerge from this judgment was that mandatory minimum sentences should not be departed from lightly, and that all aggravating and mitigating factors should be weighed in the balance in, when deciding whether the cumulative effect was to create substantial and compelling reasons for departing from these minimum sentences. And even when departing from the legislative guidelines, the courts were encouraged to remember that the intention of the legislature was that sentences generally should be more severe.

In *Matyityi*, the Supreme Court of Appeal recently had the opportunity to reinforce the principles of *Malgas*, and provide an example of the detailed consideration that is required in determining whether substantial and compelling circumstances exist.[175] The respondent had, along with two others, committed two gruesome attacks resulting in charges of murder, rape and two counts of robbery. All three were indicted in the Eastern Cape High Court but, as the respondent pled guilty, his trial was separated from that of his co-defendants. On the basis of his guilty plea, the court

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[172] South African Law Commission, *Sentencing (A new Sentencing Framework)* (Discussion Paper 91, April 2000).

[173] This was particularly noticeable in the context of rape cases: see N.J. Kubista "'Substantial and compelling circumstances': Sentencing of rapists under the mandatory minimum sentencing scheme" (2005) 18 South African Journal of Criminal Justice 58-67.

[174] [2001] ZASCA 30, 2001 (1) SACR 469.

[175] *S. v. Matyityi* [2010] ZASCA 127, 2011 (1) SACR 40.

convicted the respondent and sentenced him to 25 years' imprisonment on each of the murder and rape charges, and to 13 years' imprisonment on each of the robbery charges (to run concurrently).[176] The Director of Public Prosecutions appealed the sentences for the murder and rape convictions, under section 316B of the *Criminal Procedure Act* 1977, believing them to be too lenient.[177]

The respondent's sentence fell under section 51 of the *Criminal Law Amendment Act* 1997: unless "substantial and compelling circumstances" were found to be present, the rape and murder charges would attract a life sentence each. The court *a quo* found that such circumstances did indeed exist: "[I]n my mind, the court should not impose the prescribed minimum sentence in [this] case, in view of the accused's age, and in light of the remorse displayed by him during the trial here."[178]

On appeal, before considering whether the trial judge had correctly considered the issue of substantial and compelling circumstances, Ponnan J.A. found that the court *a quo* had misdirected itself in two other respects. First, the respondent's previous conviction of a firearms offence, rather curiously, had been disregarded as irrelevant to the current offence, therefore inconsequential to sentencing.[179] Secondly, the trial judge had found that the rape victim sustained no permanent injuries. On this point, Ponnan J. stated:

> "with respect, to restrict the enquiry to permanent physical injuries, as the learned judge appears to have done, is to fundamentally misconstrue the act of rape itself and its profound psychological, emotional and symbolic significance for the victim."[180]

With regard to the central aspect of the appeal, whether the lower court was correct in finding substantial and compelling circumstances to deviate from the prescribed minimum sentence of life imprisonment for each of the murder and rape charges, Ponnan J.A. commenced by restating the principles in *Malgas*:

> "The fact that Parliament had enacted the minimum sentencing legislation was an indication that it was no longer 'business as usual'. A court no longer had a clean slate to inscribe whatever sentence it thought fit for the specified crimes. It had to approach the question of sentencing conscious of the fact that the minimum sentence had been ordained as the sentence

176 *ibid.*, [7].
177 *ibid.*, [8].
178 *ibid.*, [9].
179 *ibid.*, [10].
180 *ibid.*

> which ordinarily should be imposed unless substantial and compelling circumstances where found to be present."[181]

The two factors held to constitute substantial and compelling circumstances in the court *a quo* – age and remorse – were then considered separately. On the issue of age, no evidence was led on behalf of the respondent in mitigation, nor did he testify. At the time that the offence was committed, the respondent was 27—exactly how his age affected his blameworthiness was never explored in the court *a quo*. No justification was provided by the trial judge as to the offender's particular attributes to explain why his age should be considered a mitigating factor. According to Ponnan J.A.:

> "The question, in the final analysis, is whether the offender's immaturity, lack of experience, indiscretion and susceptibility to being influenced by others reduces his blameworthiness. Thus while someone under the age of 18 years is to be regarded as naturally immature the same does not hold true for an adult... At the age of 27 the respondent could hardly be described as a callow youth. At best for him his chronological age was a neutral factor."[182]

The second factor the trial judge considered in finding substantial and compelling circumstances – the respondent's remorse – was manifested in his guilty plea, and in an apology issued through his counsel to the two living victims. However, Ponnan J.A. considered the implication of the overwhelming evidence against the respondent. "It has been held, quite correctly, that a plea of guilty in the face of an open and shut case against an accused person is a neutral factor".[183] He then went on to distinguish between the concepts of remorse and regret:

> "There is ... a chasm between regret and remorse. Many accused persons might well regret their conduct but that does not without more translate to genuine remorse... [B]efore a court can find that an accused person is genuinely remorseful, it needs to have a proper appreciation of inter alia: what motivated the accused to commit the deed; what has since provoked his or her change of heart; and whether he or she does indeed have a true appreciation of the consequences of those actions. There is no indication that any of this, all of which was peculiarly within the respondent's knowledge, was explored in this case."[184]

After providing a detailed consideration of each of the factors of age and remorse, the Supreme Court of Appeal held that the trial judge had relied on these factors in an inappropriate manner. Even

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[181] *ibid.*, [11].
[182] *ibid.*, [14] (original footnotes omitted).
[183] *ibid.*, [13].
[184] *ibid.* (original footnotes omitted).

in applying the minimum sentencing legislation, a sentencing court must still perform the balancing exercise of the *Zinn* triad. The trial court had been influenced by inappropriate factors and therefore had not struck the correct balance:

> "[T]o have viewed those two factors (whether individually or cumulatively) in isolation as the judge did, was to ignore the objective gravity of those offences, its prevalence in this country and the legislature's quest for severe and standardised responses by the courts. It is thus hard to resist the conclusion that the judge was motivated by maudlin sympathy for the respondent. Being so motivated, it would seem that he overemphasised the interests of the respondent at the expense of the public interest in a just and proportionally balanced sentence."[185]

This is an important judgment on the courts approach to minimum sentencing. Ponnan J.A. reaffirmed the courts duty to pay due deference to the legislature and so appropriately participate in the separation of powers:

> "Our courts derive their power from the Constitution and like other arms of state owe their fealty to it. Our constitutional order can hardly survive if courts fail to properly patrol the boundaries of their own power by showing due deference to the legitimate domains of power of the other arms of state. Here Parliament has spoken. It has ordained minimum sentences for certain specified offences. Courts are obliged to impose those sentences unless there are truly convincing reasons for departing from them. Courts are not free to subvert the will of the legislature by resort to vague, ill-defined concepts such as "relative youthfulness" or other equally vague and ill-founded hypotheses that appear to fit the particular sentencing officer's personal notion of fairness. Predictable outcomes, not outcomes based on the whim of an individual judicial officer, is foundational to the rule of law which lies at the heart of our constitutional order."[186]

The judgment in *Matyityi* not only clarifies the jurisprudence around minimum sentencing, it also expands on and emphasises the need for a "victim-centred" approach to sentencing.[187] It is trite, in terms of the *Zinn* triad, that the victim falls under the category of the "interests of society". However, the practical concerns and human rights of victims have not adequately been addressed by sentencing courts in the past, which have simply subsumed them under the interests of society. After reviewing international and national

185 *ibid.*, [21].
186 *ibid.*, [23].
187 *ibid.*, [16].

charters protecting victims' rights as well as the benefits for South Africa in adopting a more restorative approach to justice, Ponnan J.A. concluded:

> "By accommodating the victim during the sentencing process the court will be better informed before sentencing about the after effects of the crime. The court will thus have at its disposal information pertaining to both the accused and victim and in that way hopefully a more balanced approach to sentencing can be achieved. Absent evidence from the victim the court will only have half of the information necessary to properly exercise its sentencing discretion. It is thus important that information pertaining not just to the objective gravity of the offence but also the impact of the crime on the victim be placed before the court. That in turn will contribute to the achievement of the right sense of balance and in the ultimate analysis will enhance proportionality rather than harshness."[188]

VII. Information About Opportunities for Overseas Lawyers to Practise in South Africa[189]

South Africa currently has a split legal profession consisting of attorneys (in most jurisdictions, solicitors) and advocates (barristers). Under the current legislation, foreign lawyers must qualify as attorneys in South Africa in order to practise as attorneys. Unless a person is from a designated country (at present, Swaziland, Namibia, Lesotho and the former Transkei, Bophuthatswana, Venda and Ciskei states, now reintegrated into South Africa) a person must complete a South African LL.B. degree, comply with the other requirements with regard to articles of clerkship or community service and practical legal training, and sit the Attorneys Admission Examination.

A person who intends to be admitted in South Africa can submit his or her degree to a South African university for an indication of whether that university would give any credit for any part of the foreign law degree towards the South African LL.B.

Further requirements with regard to admission are provided in the *Attorneys Act* 1979.[190] The applicant must be a South African citizen or permanent resident, and otherwise be fit and proper in the opinion of the court to be admitted as an attorney. An LL.M. does not give

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188 *ibid.*, [17].

189 The information in this section was taken from the website of the Law Society of South Africa, available at <http://www.lssa.org.za/> accessed March 6, 2012; the website for the General Council of the Bar of South Africa, available at <http://www.sabar.co.za> accessed March 8, 2012; and the website of the Cape Bar, available at <http://www.capebar.co.za> accessed March 8, 2012.

190 Act 53 of 1979, as amended.

access to the profession. A South African Qualifications Authority (SAQA) or university certificate that a foreign degree is equivalent to, or of a higher status than, the LL.B. is not sufficient, unless that degree is from a university in a designated country.

A foreign citizen (or a South African) intending to practice as an advocate must first be admitted to the Roll of Advocates, a statutory register kept by the High Court. This requires being accepted for, and serving, a period of pupillage, and passing the National Bar exam. The selection criteria for pupillage include academic results (with an emphasis placed on the candidate's LL.B. average, which LL.B. must be from a South African university); relevant previous experience; aptitude to be an advocate; motivation to be an advocate; and race, sex and disability status.

In practice, certain exceptions may be made in the light of extensive practical experience in foreign jurisdictions. Law firms will, in certain instances, hire a foreign lawyer without a South African law degree for research or for consultation on cross-jurisdictional matters.

CASE NOTES

THE PRINCIPLE OF OPEN JUSTICE AND DISCLOSURE OF DOCUMENTS TO THE MEDIA IN CRIMINAL PROCEEDINGS

R. (on the application of Guardian News and Media Limited) v. City of Westminster Magistrates' Court [2012] EWCA Civ. 420 (April 3, 2012)

England and Wales Court of Appeal, Civil Division

disclosure – court documents – open justice

Background

Guardian News and Media Limited (the Guardian) applied for a number of documents referred to in the extradition proceedings of two individuals alleged to have been involved in the corruption of public officials in Nigeria. The Guardian's complaint, which is no doubt common amongst media organisations, was that it was unable to follow the proceedings given the reference to written documents during the course of court proceedings which were not read out in full. These included opening notes and skeleton arguments, affidavits submitted by the U.S. prosecution attorney and correspondence between the Serious Fraud Office and the Department of Justice.

Given the increased reliance upon written documents in court proceedings in order to streamline the hearing process, the Court of Appeal's decision in this matter provides a timely reminder that the principle of open justice should not be eroded by the exigencies of increased efficiency and cost saving.

The decision of the magistrates' court and the Divisional Court

The Guardian had an interest in investigating stories or bribery and corruption of public officials and, accordingly, one of its journalists was following extradition proceedings in the City of London Magistrates' Court brought by the U.S. Government in respect of two individuals, Geoffrey Tesler and Wojciech Chodan. These proceedings were relevant to a number of issues which the Guardian identified as being of public interest, including why the U.S. Government rather than the U.K. Serious Fraud Office was seeking to prosecute the individuals, and whether the bilateral extradition arrangements between the U.S. and the U.K. made it too easy for the U.S. to extradite U.K. citizens.

The district judge refused the Guardian's request for the relevant documents. In her judgment, although acknowledging the importance of open justice, the district judge considered that the court did not have the power to disclose these documents. Further, she referred to the immense practical difficulties of providing copy documents to third parties. In support of her decision, she relied upon the fact that the public had not been excluded from any part of the proceedings, the issues had been fully aired by counsel during the course of the hearings, and her written judgment had been circulated to members of the public and press in attendance.

The Guardian consequently applied to the Divisional Court to judicially review this decision. This application was refused on a number of grounds, including with reference to the construction of the *Civil* and *Criminal Procedure Rules* and the *Freedom of Information Act* 2000, which sets out the scheme for public access to information held by public bodies. The court held that it was settled law that the principle of open justice in criminal proceedings did not extend to allowing the public or members of the press access to documents before the court. In considering the inherent jurisdiction of the court to order such disclosure, the Divisional Court referred to the specific provision within the *Freedom of Information Act* 2000 exempting a public authority from producing a document placed in the custody of the court. The Guardian therefore appealed this decision to the Court of Appeal, which came to a very different view.

The Court of Appeal's decision

Lord Justice Toulson, delivering the leading judgment in this case, emphasised that open justice was an essential element of the legal system:

> "Who will guard the guardians themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the working of the law, for better or for worse."

Relying upon the landmark decision of the House of Lords in *Scott v. Scott* [1913] A.C. 407, Lord Justice Toulson noted that whilst there are exceptions to open justice, these must be justified by some even more important principle, the most common being "where the circumstances are such that openness would put at risk the achievement of justice which is the very purpose of the proceedings."

Importantly, Lord Justice Toulson reaffirmed that, as a common law principle, it is for the courts to determine the requirements of open justice, subject to any specific statutory provision. The Court of Appeal considered that the magistrates' court had the power to

order the disclosure of the documents in accordance with the inherent jurisdiction of the court to regulate its own proceedings. With respect to the Divisional Court's concerns with respect to the operation of the *Freedom of Information Act* 2000, Lord Justice Toulson did not consider that this scheme for access to documents was relevant to the court's inherent jurisdiction to determine access to documents in its possession – and he did not accept that Parliament could have intended to so limit the court's powers where the language of the statute did not make it "plain beyond possible doubt that this was Parliament's intention." Likewise, he was not persuaded by the arguments relating to the *Criminal Procedure Rules* at the time.

Lord Justice Toulson considered the specific objections raised by counsel representing the U.S. Government. He rejected the submission that it was sufficient for proceedings to be held in public and issues to have been fully aired given the purpose of open justice was to enable the public and the press to understand and scrutinise the workings of the justice system. He was not prepared to second guess the evidence given by the Guardian journalist that the material available through this process was inadequate. Instead, given current practice rendering court proceedings impossible to follow for the public, it was time for the court to acknowledge that counter-measures should be taken in some cases. The judge was "not impressed" by the argument, reflecting the district judge's concerns, that allowing the application would create a precedent giving rise to serious practical problems.

The court therefore held that where documents had been placed before a judge and referred to in the course of proceedings, the default position should be that access should be permitted. Where the applicant sought the documents for "proper journalistic purpose," as was accepted with respect to the Guardian, Lord Justice Toulson commented the case for ordering disclosure would be particularly strong. However, determining any such applications should also involve a consideration of countervailing factors. This case turned on the basis that the Guardian had established good reason for disclosure, there had been no suggestion that harm would follow to any other party and disclosure would not place undue burden upon the court. As with any exercise in determining proportionality, striking the right balance would be a matter of assessing the facts of each case.

Reliance upon Commonwealth case law

In assessing the common law principle of open justice central to this case, the court relied upon legal precedents from both within the European Union and throughout the Commonwealth, which Lord

Justice Toulson referred to as "strong persuasive authority." In relation to Commonwealth law in particular, he commented:

> "The courts are used to citation of Strasbourg decisions in abundance, but citation of decisions of senior courts in other common law jurisdictions is now less common. I regret the imbalance. The development of the common law did not come to an end on the passing of the *Human Rights Act*. It is in vigorous health and flourishing in many parts of the world which share a common legal tradition. This case provides a good example of the benefit which can be gained from knowledge of the common law elsewhere."

In particular, reference was made to the Canadian Supreme Court case of *Att.-Gen. of Nova Scotia v. MacIntyre* [1982] 1 S.C.R. 175 relating to an application by an investigative journalist for access to search warrants and supporting material filed with the criminal court. The court held that the public should have access to such material. The New Zealand Supreme Court case of *Rogers v. Television New Zealand* [2007] NZSC 91, [2008] 2 N.Z.L.R. 277, was also considered by the Court of Appeal. This case concerned access by a media company to a video recording held by the court of an individual's confession to murder. The court considered that such tapes should be disclosed, with Justice McGrath commenting that "Open justice strongly supports allowing the media access to primary sources of relevant information rather than having to receive it filtered according to what the court sees as relevant." Finally, reference was made to *Independent Newspapers v. Minister of Intelligence Services* [2008] ZACC 6, 2008 (5) S.A. 31, heard by the Constitutional Court of South Africa, concerning an application for disclosure of the record of court proceedings in an unsuccessful claim brought by the former head of the National Intelligence Agency. Again, this court described the "default position" as "one of openness" but, as with all proportionality exercises, commented that "the factual matrix will be all important."

Issues for the future

Since the Guardian made its original application, a new provision has been introduced to the *Criminal Procedure Rules* enabling any person to apply to a court for access to court papers. Further to the Court of Appeal's decision, any court considering an application will need to start from the point that any documents referred to in the hearing should be disclosed, only then considering any countervailing reasons for them not to be disclosed.

There are some issues that warrant further consideration. Specifically, on the facts of this case, it is unclear the extent to which a document must be "aired in court" before it is considered part of the

open hearing and therefore, subject to disclosure. The basis of the Guardian's application was that it was unable to follow the proceedings because documents referred to in the proceedings were not read out in full. However, the same argument is less convincing with respect to other documents – for example, witness statements and exhibits submitted to the court for reading ahead of the hearing, but not necessarily relied upon in the parties' submissions or the court's decision.

Further, this case turned upon the Guardian's "serious journalistic purpose" of stimulating informed public debate. However, the Court of Appeal could have provided no clearer indication of the utmost importance of open justice in this case, and there is every possibility it will pave the way for interested third parties and members of the public to make successful applications to the court for access to court documents.

From the point of view of parties submitting documents to court, clarity will need to be sought with respect to the status of documents in proceedings. However, in the meantime, parties to proceedings should be cautious in preparing and submitting documents to court on the basis that this case has opened the door a little wider for disclosure of court documents into the public domain.

EMILY CARTER.*

DNA: EXCLUSION PERCENTAGES AND PROBATIVE VALUE

Aytugrul v. R. [2012] HCA 15, (2012) 286 A.L.R. 441
(April 18, 2012)
High Court of Australia

DNA – expression of statistics – exclusion percentages

The appellant was tried for and convicted of murder before the Supreme Court of New South Wales. His appeal concerned the admissibility of evidence led at the trial about DNA analysis of hair found on the deceased's thumbnail. In essence, the impugned prosecution expert was allowed to express her conclusions (the same statistical statement) in two different ways. First, one in 1,600 people in the general population would be expected to share the DNA profile that was found in the hair (the "frequency ratio"). Secondly,

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99.9 *per cent* of people would not be expected to have a DNA profile matching that of the hair (the "exclusion percentage"). The appellant argued that expressing the results of the analysis as an exclusion percentage was so prejudicial that the provisions of sections 135 and 137 of the *Evidence Act* 1995 (N.S.W.)[1] were engaged, and required the evidence to be excluded. The unfair prejudice said to arise was the risk of subliminal rounding up by the hearer of the raw percentage figure to 100 *per cent*.

Expression of DNA exclusion percentages

For the majority (French C.J., Hayne, Crennan and Bell JJ.), no sufficient foundation had been laid for the creation or application of a general rule to the effect that evidence of DNA analysis expressed as exclusion percentages would always be inadmissible. Whilst the majority averted to what they described as "numerous articles" in "well-respected" journals on whether some forms of expressing statistics carried greater persuasive potential than others, it had not been demonstrated that the methodology employed and the results of those studies had attained such a degree of general acceptance as would permit a court to take judicial notice of some general proposition about human understanding or behaviour.

The majority were sufficiently concerned, however, to say that there might be cases where evidence given of exclusion percentages would warrant close consideration of the application of section 135 or 137. The concern was that where the results of DNA analysis are expressed quantitatively, there are assumptions and approximations made which often (perhaps always) require elucidation and explanation to make plain what are the limits to the opinion expressed as a number or range of numbers. It may very well be right to observe that a frequency ratio of one in 1,000 can, even may often, convey a different message to the hearer than does an exclusion percentage of 99.9 *per cent*, because the denominator of the frequency ratio directs the hearer's attention to the population that must be considered when seeking to apply the ratio. Not only that, it is important to recognise that evidence of DNA analysis tendered by the prosecution is tendered in proof of a case that the accused is guilty of the offence charged. It is not usually tendered only to

[1] Section 135 (general discretion to exclude evidence) providing that: "The court may refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might: (a) be unfairly prejudicial to a party; or (b) be misleading or confusing; or (c) cause or result in undue waste of time." Section 137 (exclusion of prejudicial evidence in criminal proceedings) providing that: "In a criminal proceeding, the court must refuse to admit evidence adduced by the prosecutor if its probative value is outweighed by the danger of unfair prejudice to the defendant."

exclude the possibility that there may be others who committed the offence (unless the possible class of offenders is limited). It is usually tendered to show that there is at most a small pool of persons, including the accused, who could have left a trace at the scene of the crime. But demonstrating that there are many persons in Australia who did not commit the crime charged against the accused may be thought, if that information is considered in isolation, to tend to distract attention from whether the accused is the one out of the remaining number of possible perpetrators who did commit the crime.

On the facts of this case, where both the frequency ratio and the exclusion percentage had been given, and the relationship of one to the other had been explained, the evidence, although adverse to the appellant, was in no sense *unfairly* prejudicial, or misleading or confusing. The exclusion percentage was high, but relevant content had been given by the frequency ratios that had been expressed in evidence. Accordingly, neither section 135 nor section 137 was engaged, and the appeal was dismissed.

Flirting with a re-definition of "probative value"

Heydon J. gave his own reasons, concurring with the majority, but also referring to a further strand of the appellant's argument, which he described as "an extremely interesting one", which "[if] correct … could cause sections 135 and 137 to have a radical effect on the conduct of trials".[2] This additional strand of the appellant's argument, founded on the decision of the United States Supreme Court in *Old Chief v. United States*,[3] ran to the effect that, when applying sections 135 and 137, the trial court should assess the probative value of a particular item of evidence in the light of other evidence that had been or would be admitted in the trial; a particular item of evidence may have minimal probative value because it adds very little to the other evidence.

In *Old Chief*, the majority opinion approved the view that the phrase "probative value" in rule 403 of the *United States Federal Rules of Evidence* (providing that relevant evidence may be excluded if, *inter alia*, "its probative value is substantially outweighed by the danger of unfair prejudice") signified the "marginal probative value" of the evidence relative to the other evidence in the case. This doctrine required the trial court to adopt the following approach:

> "On objection, the court would decide whether a particular item of evidence raised a danger of unfair prejudice. If it did, the judge would go on to evaluate the degrees of probative value and unfair prejudice not only for the item in question

2 *Aytugrul v. R.* [2012] HCA 15, [42].
3 [1997] USSC 2, 519 U.S. 172 (1997).

> but for any actually available substitutes as well. If an alternative were found to have substantially the same or greater probative value but a lower danger of unfair prejudice, sound judicial discretion would discount the value of the item first offered and exclude it if its discounted probative value were substantially outweighed by unfairly prejudicial risk. … [T]he judge would have to make these calculations with an appreciation of the offering party's need for evidentiary richness and narrative integrity in presenting a case, and the mere fact that two pieces of evidence might go to the same point would not, of course, necessarily mean that only one of them might come in. It would only mean that a judge applying rule 403 could reasonably apply some discount to the probative value of an item of evidence when faced with less risky alternative proof going to the same point."[4]

For Heydon J. (whose views were deliberately *obiter*[5]), a similar approach could not be adopted in relation to the phrase "probative value" as it appeared sections 135 and 137. He gave a number of reasons for this conclusion,[6] largely based on procedural differences between the United States and Australia. First, the *Old Chief* doctrine had been supported by *travaux preparatoires*, whereas the Australian Law Commission Reports which led to the enactment of the *Evidence Act* 1995 (N.S.W.), and sections 135 and 137 thereof, provided no equivalent support for adoption of the *Old Chief* doctrine, and to some extent pointed against it. Secondly, whereas the majority opinion in *Old Chief* had rejected the alternative doctrine on the basis that it would allow a prosecutor the option of structuring a trial in whatever way would produce the maximum unfair prejudice consistent with relevance, the ethical obligations of Australian prosecutors made such an outcome very unlikely in Australia. Thirdly, the *Old Chief* doctrine was, in truth, a narrow one, which had not been expanded in the United States beyond cases dealing with an accused's prior convictions. Fourthly, the procedural background in the United States differed from that in Australia, in that Australian statutes readily permitted an accused to make formal admissions, whereas in the United States the Government had to prove every element of the offence charged, whether disputed or not; accordingly, application of the *Old Chief* doctrine to sections 135 and 137 might have a very radical effect on the conduct of litigation in Australia in general, and criminal litigation in particular. Fifthly, the

4 *ibid.*, 182-83, quoted in *Aytugrul* (n.2), [44].
5 *Aytugrul* (n.2), [65].
6 *ibid.*, [47]-[51].

majority and minority in *Old Chief* had considered the impact of a prosecutor's choice as to what evidence to adduce, whereas in Australia additional consideration would be required of the impact of a prosecutor's general, though not absolute, duty to call all available witnesses.

STEPHEN LEAKE.*

EXPERT EVIDENCE IN FRAUDULENT TRADING PROSECUTIONS

Fu and Lee v. Hong Kong [2012] HKCFA 39 (May 24, 2012) Court of Final Appeal of Hong Kong

Evidence – Expert witnesses

A. Background

The appellants, Patrick Fu Kor Kuen and Francis Lee Shu Yuen, were day traders in derivative warrants (*i.e.* instruments which give investors the right to buy or sell an underlying asset at a pre-set price on or before a specified date) on the Hong Kong Stock Exchange. They had securities accounts with two firms of brokers, who offered them, because of the volume of their trading, discounted commission rates, and they were effectively paying a commission rate of 0.04 *per cent*. At the time, issuers of derivative warrants operated "commission rebate schemes" which would pay investors a rebate of between 0.1 *per cent* and 0.25 *per cent* of the value of each trading transaction. As the value of the rebate was greater than the transaction cost in the form of commission, the appellants were able to make a profit simply by buying and selling warrants to each other.

This they did on a large scale, over the course of 20 days spread over a year. On each of those days, the appellants bought and sold the warrants back and forth to one another, usually at the same price, and then, at the end of the day, they "exited" the market by selling the warrants, sometimes for a little more than they paid, sometimes for a little less, and sometimes for the same price. On each of the 20 days of their trading, the appellants' turnover constituted the bulk of the total market turnover in the relevant warrants. Over that period, through this technique, they made about $1 million.

Subsequently, they were charged with 20 offences of false trading contrary to sections 295(1) and (6) of the *Securities and Futures Ordinance* (Cap 571), and were convicted by the District Court

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(D.D.J. Sham). Mr Fu was sentenced to two years and nine months' imprisonment, and Mr Lee to three years' imprisonment. The Court of Appeal (Hon. Stock V.P., Yeung J.A., Lunn J.) refused both appellants leave to appeal against conviction, but reduced both sentences to 15 months' imprisonment (*Hong Kong v. Fu and Lee* [2010] HKCA 392, [2011] 1 H.K.L.R.D. 655). However, they were granted leave to appeal to the Court of Final Appeal (Bokhary, Chan and Ribeiro P.JJ., Litton and Gleeson N.P.JJ.).

B. Legislation

Section 295 of the *SFO* provides, as is relevant:

> (1) A person shall not, in Hong Kong or elsewhere, do anything or cause anything to be done, with the intention that, or being reckless as to whether, it has, or is likely to have, the effect of creating a false or misleading appearance –
>
> (a) of active trading in securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services; or
>
> (b) with respect to the market for, or the price for dealings in, securities or futures contracts traded on a relevant recognized market or by means of authorized automated trading services.
>
> ...
>
> (5) Without limiting the generality of subsection (1) ... , where a person –
>
> (a) enters into or carries out, directly or indirectly, any transaction of sale or purchase, or any transaction which purports to be a transaction of sale or purchase, of securities that does not involve a change in the beneficial ownership of them;
>
> (b) offers to sell securities at a price that is substantially the same as the price at which he has made or proposes to make, or knows that an associate of his has made or proposes to make, an offer to purchase the same or substantially the same number of them; or
>
> (c) offers to purchase securities at a price that is substantially the same as the price at which he has made or proposes to make, or knows that an associate of his has made or proposes to make, an offer to sell the same or substantially the same number of them,
>
> then, unless the transaction in question is an off-market transaction, the person shall, for the purposes of subsections (1) ... , be regarded as doing something or causing something to be done, with the intention that, or

being reckless as to whether, it has, or is likely to have, the effect of creating a false or misleading appearance –

(i) where the securities are traded on a relevant recognized market or by means of authorized automated trading services, of active trading in securities so traded or with respect to the market for, or the price for dealings in, securities so traded; or

(ii) where the securities are traded on a relevant overseas market, of active trading in securities so traded or with respect to the market for, or the price for dealings in, securities so traded.

(6) Subject to subsection (7), a person who contravenes subsection (1) ... commits an offence.

(7) Where a person is charged with an offence under subsection (6) in respect of a contravention of subsection (1) ... taking place through the commission of an act referred to in subsection (5)(a), (b) or (c), it is a defence to the charge for the person to prove that the purpose for which he committed the act was not, or, where there was more than one purpose, the purposes for which he committed the act did not include, the purpose of creating a false or misleading appearance of active trading in securities, or with respect to the market for, or the price for dealings in, securities, referred to in subsection (1) ...

C. Discussion

The court examined the structure of section 295 of the *SFO*: subsection (1) setting out a general prohibition, subsection (5) deeming certain conduct to fall within that prohibition, subsection (6) making breach of the prohibition an offence, and subsection (7) providing a defence that may only be relied upon when subsection (5) applies. It held that subsection (7) applied whenever subsection (5) applied, whether or not it had been relied on by the prosecution, and that, as it was common ground that subsection (5)(b) and (c) applied in this case, the appellants were therefore able to raise the defence.

The first main issue was whether that defence imposed an evidential or persuasive burden on the appellants. The court held that, on the face of the statutory language, the defence imposed a persuasive burden, and, having considered the background to the legislation and its purpose, further held that such a burden pursued a legitimate societal aim (*viz.* the maintenance of an orderly and fair securities market) and moreover was proportionate to that aim. The burden was therefore on the appellants to make out the defence on the balance of probabilities. Since the background and the conduct of the appellants were not in dispute, the second main issue was accordingly the purpose or

purposes with which the appellants had acted, and so the court went on to consider the evidence that had been called at trial.

Both the prosecution and each of the appellants had called an expert witness to give evidence as to the securities market. The court held that the three expert witnesses had been in a position to provide information about the market that could have assisted the trial judge in finding facts relevant to a judgment about the state of mind of the appellants. However, it said that, although the experts may have believed, with justification, that their experience of the market gave them insight into the possible motivations of traders that would not be available to an outsider, the only information they could usefully and legitimately impart would be information about the market, not an opinion about the state of mind of a particular person acting on a particular occasion. It held that a sound basis for an inference as to the purpose or purposes of the appellants was an accurate appreciation of where their commercial interests lay, and that although experts in the securities market were in a position to provide evidence that would assist such an appreciation, it was the judge who would have to draw the inference.

In this case, the trial judge had found that one of the purposes of the appellants had been to create a false appearance of active trading in the derivative warrants in order to facilitate their own exit from the market at the end of each day by ensuring that the warrants would be bought back (in most cases by the liquidity provider appointed by the issuer of the warrants) at the desired price. However, he had come to this conclusion not on the basis of the expert evidence but on the basis of "common sense", rejecting the defence argument that the buying back of the warrants was for all practical purposes assured. The court criticised this approach, stating that it oversimplified both the evidence and the arguments, and noted that the judge should have made findings as to the role of the liquidity provider and the expectations of the appellants as to its conduct, which could well have been other than the black-and-white situation envisaged by the trial judge's own "common sense" approach.

Having considered all the evidence itself, the court concluded that the primary purpose of the appellants had been obvious (*viz.* to make a profit from the operation of the rebate scheme). It noted that there was circularity about the secondary purpose attributed to the appellants (*viz.* to create a false impression of active trading), in that the prices of the warrants in which they were trading remained fairly stable over each of the days upon which they were active; they sold out, usually to the liquidity provider, at about the prices at which they bought in; they did not encourage, or apparently seek to encourage, other investors to buy the warrants at a higher price; and there was no evidence to support an inference that the liquidity provider

required encouragement to buy back at about the original prices. It concluded that the buying and selling between the appellants was both sufficient and necessary to achieve their commercial purpose of earning rebates, that the hypothesis that it was undertaken partly in aid of some additional objective should have been rejected, and that the appellants had therefore made out the subsection (7) defence.

D. Outcome

The court unanimously allowed the appeal and quashed both appellants' convictions. Because of its finding on the basis of the evidence at trial that the defence had been made out, it did not order a retrial.

E. Comment

The lead judgment (with which all the other judges agreed) was delivered by Gleeson N.P.J., *i.e.* the Hon. Murray Gleeson A.C., formerly Chief Justice of the High Court of Australia. This was particularly appropriate given that, as the court noted, the relevant Hong Kong legislation was based on the corresponding Australian legislation, *viz.* section 998 of the Corporations Law of Western Australia as incorporated into the *Corporations Act* 2001, the similarities and differences between which the court started its consideration of the legislation by examining.

As to the latter, whereas the Hong Kong offence is based on state of mind – intention or recklessness as to having, or being likely to have, the effect of creating a false or misleading appearance – the Australian offence, whilst likewise criminalising intentional acts – doing anything intended to create a false or misleading appearance (section 998(1)) – is principally concerned with acts establishing an objective state of affairs – creating, or doing anything likely to create, a false or misleading appearance (also section 998(1)). Similarly, the Australian equivalent to section 295(5), *viz.* section 998(5), in the relevant circumstances, deems a person actually to have created a false or misleading appearance, rather than merely to have intended or been reckless as to having, or being likely to have, the effect of creating such an appearance.

However, it is the similarities which are principally of interest. The statutory defences in sections 295(7) and 998(6) are of equivalent effect despite the different formulation of the two offences. Moreover, the court's conclusion as to the standard of proof applicable to the section 295(7) defence accords with the position in Australian law as to that applicable to the section 998(6) defence (as confirmed by the High Court of Australia in *Braysich v. The Queen* [2011] HCA 14, (2011) 243 C.L.R. 434), perhaps unsurprisingly given the global importance of the integrity of stock markets, the overall similarity between the two statutes and the consideration given by the court to the Australian

legislation (and its predecessor legislation), as interpreted by the High Court of Australia (*North v. Marra Developments Ltd* [1981] HCA 68, (1981) 148 C.L.R. 42), in drawing its own conclusions.

The greatest value of this case to Commonwealth practitioners, however, is the court's detailed and careful analysis of the role of expert witnesses in such cases. Although it stressed that in many cases a defendant will need to give evidence in order to discharge the persuasive burden of proof, and that arguments advanced by counsel, or developed on the basis of expert witnesses, will not suffice where the existence of an innocent purpose remains speculative, it is clear that in some cases expert evidence alone will indeed be sufficient, and it will be vital for both prosecuting authorities and defendants facing similar allegations to bear this firmly in mind when considering the appropriate case strategy. Furthermore, the court's strong views on the importance of coming to fully reasoned conclusions on the basis of expert evidence, and not simply making assumptions based on "common sense", provide a firm foundation for the development of a common approach to such cases throughout related jurisdictions, and should ensure that this area of the law is properly, sensibly and fairly applied in the future.

PETER FITZGERALD.*

INFORMER PRIVILEGE AND THE DEFENCE'S RIGHT TO INVESTIGATE

R. v. Barros, 2011 SCC 51, [2011] S.C.R. 368
(October 26, 2011)
Supreme Court of Canada

informer privilege – fair trial – perverting the course of justice

A. Informer privilege: a key tool across jurisdictions

Informers are often key to the police's work. They provide information to which the police and – eventually – prosecution would not otherwise have access, or which it would otherwise be prohibitively expensive or dangerous to get. In exchange, they are afforded protection, by the police and prosecution, from being unmasked – and therefore from reprisals. The protection afforded serves both to encourage informers to come forward, and possibly to turn them into a longer-term police "source"; and thereafter, to protect their position within the organisation under investigation. Indeed, in England and

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Wales, it is accepted practice not even to acknowledge the existence of an informer[1] – the mere knowledge that there is one may endanger his or her position; and were denials common, the absence thereof might alert the organisation to the likely presence of an informer.

However, although strong, the privilege can be challenged. Canada has an "innocence at stake" test: the defence must show, on the evidence, that disclosure of the informer's identity is necessary to demonstrate the defendant's innocence.[2] It is necessary to balance the public interest in protecting informers, with the right to a fair trial and, in particular, the accused's right to make full answer and defence to the charges laid.[3] Obvious cases where the identity of the informer is relevant will be where the defendant alleges (credibly) that he or she was set up; or his or her role was something other than what is alleged; or the defence wish to challenge the evidence on the basis that the informant had some other reason to "finger" him or her – *e.g.* there was "bad blood" between them.

B. The facts

In March 2005, the Edmonton, Alberta drug squad twice searched premises belonging to Irfan Qureshi, netting, *inter alia*, four handguns, 1.5 kg of methamphetamine, 5.5 kg of cocaine, and drug paraphernalia.

The search warrants were based in part on information provided by a confidential police informer. Qureshi and a number of his associates were charged with drug trafficking and firearms offences.

Defence counsel retained Ross Barros, a retired police officer of 25 years' experience – seven of which in the Edmonton drug squad – as a private investigator. Barros took steps to discover the informer's identity. He allegedly compelled members of Qureshi's entourage to provide him with telephone numbers; and told them the informer should seek legal advice so they could "work this thing together".[4] He obtained their phone records from sources unknown; compared their criminal records with the informer's disclosed record; engaged a polygraph operator to test those members of the entourage who had not provided their phone numbers; and approached individuals within the group, telling them he "knew" they were the informant.[5]

Barros then met the investigating officer – a personal friend – and a colleague of the officer, at a local golf course. He told them that he had identified the informant (but not who he was); that he did not

1 *R. v. Roussow* [2006] EWCA Crim. 2980.
2 *R. v. Leipert* [1997] 1 S.C.R. 281 (Supreme Court of Canada).
3 *Canadian Charter of Rights and Freedoms*, s.7.
4 *R. v. Barros*, 2011 SCC 51, [2011] S.C.R. 368, [9].
5 *ibid.*, [10].

intend to tell Qureshi or his counsel who it was, at that time;[6] however, that he would have to tell the latter, eventually.[7] He then told the officers that he remembered, from his time with the force, that a threat of discovery of a source's identity often led to charges being dropped.

Barros was charged with obstruction of justice[8] for wilfully taking investigative steps to determine the identity of an informant (the focus of this note); and two counts of extortion,[9] for attempting to make the police withdraw the charges against Qureshi, and for making Qureshi's associates divulge their telephone numbers.

C. The Supreme Court's judgment

1. The scope of the informer privilege and the right to make full answer and defence

Binnie J., for the majority, described the informer privilege as "a rule of non-disclosure binding on the police, the prosecutorial authorities and the courts".[10] He cautioned against extending this into a general prohibition on investigating informers' identities, as the Alberta Court of Appeal had typified it.[11] This was linked to the right to make full answer and defence,[12] but, again, Binnie J. warned against concluding that "all attempts by the accused to identify a confidential informer are constitutionally protected".[13] Preventing the defence from investigating the identity of the source of allegations against them would render illusory the right to challenge his or her "informer" status.[14] But "a lawful activity may be pursued by unlawful means or for an unlawful purpose,"[15] and this was the crux of the case against Barros.

2. The purpose of defence investigations

On the count of obstruction of justice, the trial judge had directed a "not guilty" verdict.[16] This would only have been available where there was no admissible evidence which, if believed by a properly charged jury acting reasonably, would justify conviction.[17] Binnie J. held that such evidence was present: it would have been open to a jury to find that Barros' actions were not mere "preparation", and that his investigations were geared not at challenging the informer's

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6 *ibid.*, [12].
7 *ibid.*, [13].
8 *Criminal Code of Canada* 1985, s.139(2).
9 *Criminal Code of Canada* 1985, s.346(1.1).
10 *Barros* (n.4), [1], [37]-[44].
11 *ibid.*, [1]; *R. v. Barros* ["Barros CA"], 2010 ABCA 116, (2010) 477 A.R. 127.
12 *Canadian Charter of Rights and Freedoms*, s.7.
13 *Barros* (n.4), [2], [42]; *cf. R. v. Barros* ["*Barros* QB"], 2007 ABQB 428, [18].
14 *Barros* (n.4), [39].
15 *ibid.*, [44].
16 *Barros* QB (n.13), [22]; *Barros* (n.4), [47].
17 *Barros* (n.4), [48].

status and credibility, but at obstructing justice by causing the police to abort the trial.[18] This was an error of law justifying a new trial, which the Supreme Court ordered.[19]

D. Comment

The majority's approach was, it is submitted, clearly correct. Whereas informer privilege is an important tool, it must be open to the defence to test the case properly. However, where this investigation is undertaken through unlawful means (*e.g.* threatening witnesses), or where the information uncovered is used to unlawful ends (*e.g.* scuppering the trial), such actions should not be protected.

In New Zealand, the privilege is regulated by the *Evidence Act* 2006, ss.53, 64 and 67. A judge may order disclosure where the information is "necessary to enable the defendant in a criminal proceeding to present an effective defence".[20] In England and Wales, the prosecution are under a duty to disclose any material "which might reasonably be considered capable of undermining the case for the prosecution against the accused or of assisting the case for the accused".[21] Intercept material is excluded from disclosure,[22] as is material which the court deems it is not in the public interest to disclose.[23] The non-disclosure of material that attracts public interest immunity (PII) is a matter for the court: *R. v. H.*[24]

The Canadian "innocence at stake" exception[25] seems a higher test than that either of these Commonwealth jurisdictions. The protection of informants from the other "checks" of the adversarial system of justice – giving evidence on oath, and cross-examination – is high. In this context, it is all the more important to the protection of the defence's section 7 *Charter* rights, that they are free to gather evidence with which to challenge the "informer" status of witnesses at trial.

ATLI STANNARD.*

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18 *ibid.*, [49].

19 *ibid.*, [51]. A retrial was also ordered on the first count of extortion ([79]), but not the second ([82]).

20 *Evidence Act* 2006 (N.Z.), s.67(2).

21 *Criminal Procedure and Investigations Act* 1996 (U.K.), ss.3(1)(a) and 7A(2)(a). The prosecutor must keep the question under review (*CPIA* 1996, s.7A).

22 *CPIA* 1996, ss.3(7) and 7A(9), and *Regulation of Investigatory Powers Act* 2000, s.17.

23 *CPIA* 1996, ss.3(6) and 7A(8).

24 [2004] UKHL 3, [2004] 2 A.C. 134; a court must address seven questions when considering an application for PII non-disclosure: *ibid.*, [36].

25 *Leipert* (n.2), and text at n.2, *ante.*

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CONSTRUCTIVE LIABILITY IN SINGAPORE

Kho Jabing v. Public Prosecutor [2011] SGCA 24, [2011] 3 S.L.R. 634 (May 24, 2011) Singapore Court of Appeal

curder – complicity – common intention to commit robbery

A. Introduction

When is a person answerable for a crime committed by another? The doctrine of constructive liability (or joint criminal enterprise as it is known in other parts of the common law world) is one which has periodically stoked concerns of over-criminalisation around the world in domestic as well as international criminal tribunals.[1] In the domestic sphere, the typical situation is a primary offence (for example, robbery) planned by all the participants, and one of them commits a collateral offence (for example, murder) in the process. Although it can be argued that all the participants had taken part in the robbery, concerns are raised if liability is to be imposed for the murder on those who did not actively participate in it. This is literally an issue of life and death, since a conviction for murder carries with it a mandatory death sentence in Singapore, but a conviction for robbery alone does not.

A general provision in section 34 of Singapore's Penal Code imposes constructive liability for a collateral offence based on the parties' "common intention" to commit the primary offence.[2] In one case, the provision was described as operating "to impute liability to a participant whose participation contributed to the result, though he cannot be proved to have committed the *actus reus* himself".[3] Section 34 states:

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1 See for example *R v. Powell, R v. English* [1999] 1 A.C. 1 (House of Lords, U.K.); *R. v. Mendez* [2010] EWCA Crim. 516, [2011] Q.B. 876; *Clayton v. R.* [2006] HCA 58, (2006) 81 A.L.J.R. 439 (Australia); and *Prosecutor v. Tadić*, Case no. IT-94-1-A (ICTY Appeals Chamber, July 15, 1999). See also the proposals contained in Law Commission for England Wales, *Participating in Crime* (Law Com. no. 305, TSO 2007).

2 Other specific provisions can be found in the Penal Code relating to abetment (ss.111 and 113), unlawful assembly (s.149) and gang robbery with murder (s.396). See S. Yeo, N. Morgan, W.C. Chan, *Criminal Law in Malaysia and Singapore* (2nd edn, LexisNexis 2012), ch. 35. Singapore's Penal Code is substantially the same as the one in operation in India, Pakistan, Sri Lanka, Malaysia, Brunei and several other former British colonies. It is based on the Indian Penal Code drafted by Lord Macaulay for British India in the 19th century (see Barry Wright, "Macaulay's Indian Penal Code and Codification in the Nineteenth Century British Empire", *post*, 25; Greg Taylor, "Macaulay's IPC – A Success at Home, Overlooked Abroad", *post*, 51). Singapore courts frequently cite Indian cases as persuasive authority on the interpretation of the Penal Code.

3 *Shaiful Edham bin Adam v. Public Prosecutor* [1999] SGCA 94, [1999] 1 S.L.R.(R.) 442, [51] ("*Shaiful Edham*").

> When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if the act were done by him alone.

There no guidance in the Penal Code on what the phrase "in furtherance of the common intention of all" means.[4] The origins of the phrase may well be the doctrine of "common purpose" in English common law, but its meaning should be determined without recourse to the common law, since the criminal law in Singapore is now codified.[5]

The high water mark to constructive liability is probably the interpretation that section 34 only requires that the participants have "some *knowledge* that an act may be committed which is *consistent with* or would be in furtherance of, the common intention".[6] Hence,

> " if A and B form a common intention to cause injury to C with a knife and A holds C while B stabs C deliberately in the region of the heart and the stab wound is sufficient in the ordinary course of nature to cause death, B is clearly guilty of murder [under section 300(c) of the Penal Code]. Applying section 34 it is also clear that B's act in stabbing C is in furtherance of the common intention to cause injury to C with a knife because B's act is clearly *consistent* with the carrying out of that common intention and as their 'criminal act', *i.e.* that unity of criminal behaviour, resulted in the criminal offence of murder … A is also guilty of murder."[7]

Under this approach, for participants who jointly plan to commit robbery or to cause hurt, if murder is committed by one of them in the process, all can be held liable for committing murder since it can be said that murder is "consistent" with robbery or causing of hurt if they knew

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4 Other elements, such as whether there must be presence at the scene of the crime, prior concert involving the accused, and overlap between the other provisions imposing constructive liability, will not be discussed in this case note. For further information, see Yeo, Morgan, Chan, (n.2).

5 See, for example, *Public Prosecutor v. Kwan Kwong Weng* [1997] SGCA 8, [1997] 1 S.L.R.(R.) 316, which considered whether the phrase "carnal intercourse against the order of nature" in the now deleted s.377 of the Penal Code should be interpreted in conformity with English criminal law at the time when the Indian Penal Code was drafted. On the other hand, some cases have allowed references to English law where the meaning of the particular phrase in the Penal Code is ambiguous: see *Lee Chez Kee v. Public Prosecutor* [2008] SGCA 20, [2008] 3 S.L.R.(R.) 447, [129]–[133], [196] ("*Lee Chez Kee*").

6 *Shaiful Edham* (n.3), [57] (emphasis added), citing, *inter alia*, *Wong Mimi v. Public Prosecutor* [1972] SGCA 5, [1971-1973] S.L.R.(R.) 412 ("*Wong Mimi*"); *Bashir v. State of Allahabad*, A.I.R. 1953 All. 668 (Allahabad High Court). Other approaches which give an even more extensive scope of constructive liability have been referred to, but were not seriously considered: see, for example, *Public Prosecutor v. Tan Lay Heong* [1996] SGHC 47, [1996] 1 S.L.R.(R.) 504 (sufficient for the collateral offence to have been an objectively probable consequence); *Public Prosecutor v. Too Yin Sheong* [1998] SGHC 286 (sufficient for the collateral offender to have intended to further the joint criminal venture); *Public Prosecutor v. Lim Poh Lye* [2005] SGCA 31, [2005] 4 S.L.R.(R.) 582 (a form of strict liability).

7 *Wong Mimi* (n.6), [25] (emphasis added).

of the chance of it happening, for example if they knew that weapons would be brought along by one of the participants.[8] There is no need to show that the participants intended the commission of murder.

In 2010, the Singapore Court of Appeal changed the law on the use of section 34 in *Daniel Vijay s/o Katherasan v. Public Prosecutor*.[9] A person can only be constructively held liable for the crime committed by another if he or she had the intention to commit the crime actually committed. Hence, in the example given above, A can only be held constructively liable for the murder committed by B if he also had the intention to commit murder: their joint intention to cause injury to C is insufficient.

B. Kho Jabing v. Public Prosecutor

In the case which is the subject of this note, *Kho Jabing v. Public Prosecutor*,[10] the Court of Appeal took the opportunity to further clarify the law on section 34. In that case, the two appellants from Sarawak in East Malaysia, Galing and Jabing, assaulted two persons with the intention of committing robbery. Galing used a belt wrapped around his hand or fist, with the metal buckle exposed; Jabing used a piece of wood or tree branch. One of the victims suffered minor injuries, but the other died from severe head injuries inflicted by the piece of wood.

The Court of Appeal held that Jabing was rightly convicted of murder since he had intentionally inflicted the head injuries on the victim which caused his death. However, the court held that Galing was not constructively liable for the murder under section 34, since he only had the common intention to commit robbery, and not murder. It was held that there must be at least a contingent common intention to commit murder, such as a common intention to rob and to kill the victim if necessary, if the victim puts up a fierce struggle. Since the trial judge only found that Galing knew that serious injury might be inflicted on the victims in the course of the robbery, this was not sufficient to trigger the application of section 34.

Two comments may be made about this case. Firstly, it had been noted in previous case law that the intention to commit an offence

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8 For example *Syed Abdul Aziz v. Public Prosecutor* [1993] SGCA 65, [1993] 3 S.L.R.(R.) 1 (Singapore Court of Criminal Appeal); *Asogan Ramesh s/o Ramachandren v. Public Prosecutor* [1997] SGCA 60, [1997] 3 S.L.R.(R.) 201.

9 [2010] SGCA 33, [2010] 4 S.L.R. 1119 ("*Daniel Vijay*"). The court disavowed intention to overrule *Wong Mimi*, holding that the earlier case law had been misunderstood, but this explanation is unconvincing considering the consistent application of s.34 over the years following its decision of *Wong Mimi*. In *Shaiful Edham* (n.3), the Court of Appeal said: "s.34 has had a chequered interpretation, though the position is not now in doubt due to the numerous judgments … in which the leading authorities have been stated and restated" ([52]).

10 [2011] SGCA 24, [2011] 3 S.L.R. 634 ("*Kho Jabing*"). The trial judge's decision in *Kho Jabing* was given before the Court of Appeal's judgment in *Daniel Vijay*.

may be inferred from knowledge of it being committed.[11] Since it was found in this case that there was knowledge that one of the participants may commit serious injury, why was it that the intention to commit murder could not be inferred? Under the Penal Code, murder may be committed with one of four fault elements.

Section 300 of the Penal Code states:

> "culpable homicide is murder –
> (a) if the act by which the death is caused is done with the intention of causing death;
> (b) if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused;
> (c) if it is done with the intention of causing bodily injury to any person, and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or
> (d) if the person committing the act knows that it is so imminently dangerous that it must in all probability cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death, or such injury as aforesaid."

Thus, under section 300, murder may be committed even if the accused did not *intend* a fatal injury. Under section 300(c), it is sufficient if the accused intended an injury which is *objectively* shown to be sufficient to kill;[12] while under section 300(d), it is sufficient if the accused *knew* that the act would prove fatal. In *Daniel Vijay*, the different approach adopted in section 34, as opposed to section 300, was explained in this way:

> "Different policy considerations apply when imputing direct liability for murder and when imputing constructive liability for that offence. It may be just to hold the actual doer liable for the offence arising from his own actions, but, in our view, it may not be just to hold the secondary offender constructively liable for an offence arising from the criminal act of another person (*viz*, the actual doer) if the secondary offender does not have the intention to do that particular criminal act."[13]

One must ask whether it is truly just to hold the actual doer liable for murder, if he or she did not have the intention to inflict a fatal injury in the first place. Moreover, in cases of assaults to commit robbery and fights between rival gangs, violence can easily escalate in the heat of the moment. It may be a matter of luck which of the injuries inflicted by

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11 *Daniel Vijay* (n.9), [89]: "the line between subjective knowledge that a particular criminal act might likely occur and a common intention to do that particular act may be rather thin. Depending on the circumstances of the case, a subjective knowledge may be evidence of the existence of a particular intention …."

12 *Virsa Singh v State of Punjab*, A.I.R. 1958 S.C. 465.

13 *Daniel Vijay* (n.9), [76].

the participants will eventually prove fatal. In *Kho Jabing* itself, both the accused had used weapons on the deceased in committing the robbery. The trial judge found that their "intention was to rob the victims by the use of force, and that Galing knew that when he and Jabing robbed the deceased, the deceased would be assaulted and serious injuries might be inflicted on him".[14] It is doubted if there is a real difference in culpability between Galing and another hypothetical accused who agreed to commit robbery and to use all force necessary to achieve their goal.

Secondly, it was said in *Kho Jabing* that there must be a "common intention with the actual doer to commit murder".[15] This is imprecise, since, as stated above, there are four different levels of fault specified for murder in section 300. In *Daniel Vijay*, it was noted that a high "degree of specificity"[16] was required of the secondary offender's intent for section 34 to apply. If the primary offender is charged with murder under section 300(c), the secondary offender must have the common intention to cause a "section 300(c) injury".[17] However, what is a "section 300(c) injury"? It would appear that scientific evidence is needed to show that the injuries such as being hit on the head with a weapon are sufficient, in the ordinary course of nature, to cause death.[18] However, such scientific evidence is not required to hold the actual doer liable for murder under section 300(c): a broad-based and simple enquiry is adopted instead.[19] A difference thus exists between direct liability under section 300(c) for the actual doer, and constructive liability under section 34. Imposing a scientific assessment of the injury inflicted arguably makes it easier to convict the secondary offender for murder under section 300(c), which is contrary to the recent developments to restrict constructive liability under section 34. It is submitted that a better solution is to require proof of a common intention "to cause death" rather than to "commit murder".

C. Conclusion

In *A Modern Treatise on the Law of Criminal Complicity*, Professor Smith asked:

> When determining the liability for collateral offences, the central question has been whether, if at all, the basis of responsibility is different from that used in settling liability for the primary offence. More particularly, in relation to specificity of knowledge, does the *mens rea* necessary for complicity in the primary offence in any

14 *Kho Jabing* (n.10), [15].
15 *ibid.*, [33].
16 *Daniel Vijay* (n.9), [68], [72].
17 *ibid.*, [145].
18 *ibid.*, [147].
19 *Virsa Singh* (n.12), [11].

> way act as a substitute for or dilute the full accessorial *mens rea* that would normally be required for the collateral offence?[20]

The answer given by the Singapore courts is "no": the secondary offender must have nothing less than the *intention* to commit the collateral offence committed. This is so even if the actual doer can be convicted of the collateral offence by proof of a lesser *mens rea*. For example, in the case of murder, the actual doer can be convicted if he had the *mens rea* required under section 300(c) or (d).

The court's current interpretation of section 34 may be influenced by the frequent use of section 34 in cases of murder which carry the mandatory death penalty. The court is rightly concerned that the moral culpability for constructive liability should not be set too low. However, the present approach in section 34 is too restrictive. A more appropriate level is to require the secondary offender to *know* that one of the participants may likely commit the collateral offence.[21] This approach is also one which aligns section 34 with the approach taken in other provisions in the Penal Code dealing with abetment and offences committed by a member of an unlawful assembly.[22]

An alternative which has not been explored adequately in Singapore – or other Penal Code jurisdictions – is to make use of another Penal Code provision to convict for a lesser offence than the principal offender. Hence, if the accomplice knows that serious injuries are likely to be caused during the robbery, and the victim dies, section 38 of the Penal Code allows for him or her to be convicted of culpable homicide, while the principal offender is convicted of murder.[23] This approach acknowledges the connection of the accomplice to the *death* caused, instead of holding him or her liable for the robbery only.[24]

WING-CHEONG CHAN.*

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[20] K.J.M. Smith, *A Modern Treatise on the Law of Criminal Complicity* (OUP 1991), 209-210.

[21] This was the holding of an earlier Court of Appeal decision in *Lee Chez Kee* (n.5).

[22] Sections 111, 113 and 149 of the Penal Code.

[23] Section 38 reads: "Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act". The offence of culpable homicide is provided for in s.299: "Whoever causes death by doing an act … with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide". See, *e.g.*, *Bhaba Nanda Sarma v. State of Assam*, A.I.R. 1977 S.C. 2252.

[24] The punishment in Singapore for robbery can be severe. For example, whoever causes hurt while committing robbery is subject to a mandatory minimum sentence of 5 years' imprisonment, up to a maximum of 20 years' imprisonment, and also to a mandatory minimum sentence of 12 strokes of the cane (s.394). The punishment for culpable homicide where the offender only knew that the act was likely to cause death is punishable with imprisonment of up to 10 years, a fine, caning, or any combination of these punishments (s.304(b)).

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THE STATE OF COMMON PURPOSE LIABILITY IN SOUTH AFRICA

S. v. Mzwempi [2011] ZAECMHC 5, 2011 (2) S.A.C.R. 237 (April 28, 2011) Eastern Cape High Court, Mthatha

participation – individual responsibility for collective crimes

A. The facts

In an instance of faction fighting, a tribal occurrence still part of the deep rural areas in South Africa, the Manduzini clan engaged in a pre-dawn attack on the Makhwaleni clan, which was deemed by the court to be reminiscent of the massacre of the McDonald clan by the Campbells in 1692. Four of the Manduzini attackers were convicted of five counts of murder, seven counts of attempted murder and 28 counts of arson, based on the common purpose doctrine. The case dealt with the appeal of one of the attackers against conviction.

Following an analysis of the evidence against the appellant, it was concluded, *inter alia*, that whilst the appellant was an armed member of the attacking force who launched the assault on the Makhwaleni, it could not be established beyond reasonable doubt that (i) the appellant could be individually linked to any of the particular crimes; (ii) that the crimes had not already been committed when he was identified by the witnesses; or (iii) that the appellant was a party to a prior agreement to commit any of the crimes. After an evaluation of the law relating to common purpose the court finally concluded that in the light of the prevailing law, referred to by the court as "the rule in *Safatsa / Mgedezi*" (derived from the Appellate Division decisions of *S. v. Safatsa*[1] and *S. v. Mgedezi*[2]), the conviction should be set aside. In light of the factual determinations by the court, this finding cannot be faulted.

B. The law

The South African doctrine of common purpose has its roots in the English law. It appears to have first been introduced by the *Native Territories Penal Code* 1886,[3] which was largely based on the Criminal Code drawn up by Sir James Stephen.[4] The doctrine has sparked

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1 *S. v. Safatsa and others* [1987] ZASCA 150, 1988 (1) SA 868 (also reported as *S. v. Sefatsa and others*).

2 *S. v. Mgedezi and others* [1988] ZASCA 135, 1989 (1) SA 687.

3 Act 24 of 1886 (Cape).

4 See M.A. Rabie "The doctrine of common purpose in criminal law" (1971) 88 South African Law Journal 227, 229; Exton Burchell, John Milton,

controversy in South Africa. Its use in a number of high-profile "political" trials in the latter years of apartheid rule, particularly in combination with the death penalty, raised questions about its legitimacy. In *S. v. Thebus*,[5] the Constitutional Court, however, unanimously affirmed the constitutionality of the common purpose doctrine.

The definition of the doctrine set out in Burchell's *Principles of Criminal Law*[6] was adopted in *Mzwempi*:

> "Where two or more people agree to commit a crime or actively associate in a joint unlawful enterprise, each will be responsible for the specific criminal conduct committed by one of their number which falls within their common design."[7]

The doctrine thus applies to crimes which involve an unlawful consequence, and provides that where there has been a prior agreement to commit a crime or an intentional active association with the commission of the crime, the State need not prove a causal contribution on the part of all the participants, as the conduct of the participant who caused the consequence is imputed to the other participants. The requirements for liability under common purpose in the context of "active association" have been set out in the context of murder in *Mgedezi*: (i) presence at the scene of the assault; (ii) awareness of the assault; (iii) intention to make common cause with the assailant(s); (iv) manifestation of sharing a common purpose through some act of association with the assailants; and (v) intention to kill.[8] It bears noting that in South African criminal law the intention requirement may be established in the form of direct intention, indirect intention or *dolus eventualis*, which may be defined as foresight of the possibility of harm occurring, coupled with reconciliation with the risk of such harm.

Alkema J., writing for the court in *Mzwempi*, summarised the effect of the "rule and approach adopted in *Safatsa / Mgedezi*" in the following terms. Common purpose liability, in terms of which the conduct of the participants in the joint venture is imputed to the accused, may arise out of two circumstances, between which a distinction is drawn, *i.e.* a prior agreement and an active association.[9] Where a prior agreement cannot be established, liability can only be based on active association, which is "much more restrictive", being

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Jonathan Burchell, *South African Criminal Law and Procedure* (2nd edn, Juta 1983), vol. I, "General Principles of Criminal Law", 38-9.

5 *S. v. Thebus and another* [2002] ZASCA 89, 2003 (2) SACR 319.

6 J. Burchell, *Principles of Criminal Law* 3ed (2005) 574, affirmed in *Thebus* (n.5), [18].

7 *S. v. Mzwempi* [2011] ZAECMHC 5, (2) SACR 237, [50].

8 *Mgedezi* (n.2), 705I-706C.

9 *Mzwempi* (n.7), [76].

assessed on the basis of the individual actions of the particular accused (for the test see the first four requirements of *Mgedezi* as set out *ante*) in the particular factual context of the case.[10] The other definitional elements of the crime are further required to be present.[11]

The court however identified an Appellate Division judgment which it regarded as inconsistent with the *Safatsa / Mgedezi* approach. The murder conviction founded on common purpose in *S. v. Nzo*[12] followed the killing of the victim, who had threatened to reveal to the police the undercover African National Congress (ANC) group (then banned) engaged in acts of sabotage in Port Elizabeth. Despite the lack of evidence that the accused in *Nzo* were aware of the murder or knew that it was going to be committed, their foresight of the possibility of murder and continued association with the common purpose of the group was held to be conclusive. It was argued on appeal that liability could not be imputed to every ANC member (in the context of the armed struggle) for every foreseen crime committed by other ANC members, and that imputed liability should be "limited to crimes with which the accused specifically associates himself":

> "This is so because liability on the basis of the doctrine of common purpose arises from the accused's association with a particular crime and is not imputed to him where he associates himself, not with a particular crime, but with a criminal campaign involving the commission of a series of crimes. In such a case he can be convicted, apart from crimes in which he personally participated, only of those with which he specifically associated himself."[13]

However, the majority of the court in *Nzo* (*per* Hefer J.A., Nestadt J.A. concurring) held that it was neither concerned with the "liability of the members of the ANC for crimes committed by other members" nor "the appellants' liability merely as members of the organization"[14] but rather the actions of three individuals who formed the core of the ANC cell in Port Elizabeth and

> "functioned as a cohesive unit in which each performed his own allotted task. Their design was to wage a localized campaign of terror and destruction; and it was in the furtherance of this design and for the preservation of the unit and the protection of each of its members that the murder was committed."[15]

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10 *ibid.*, [77].
11 *ibid.*, [78].
12 *S. v. Nzo and another* [1990] ZASCA 10, 1990 (3) SA 1.
13 *ibid.*, 7E-G.
14 *ibid.*, 7G-H.
15 *ibid.*, 7H-J.

The court therefore approved the trial court's reasoning on the question of common purpose[16] (although the first appellant was acquitted on the basis of dissociation[17]).

Given that the *Safatsa / Mgedezi* approach has been approved in *Thebus*, which does not refer to *Nzo*, the question for the *Mzwempi* court was whether the judgment in *Nzo* still constitutes binding authority.[18] The court was concerned that, if so, then the appellant was correctly convicted on all counts by the trial court.[19]

The court listed a range of negative implications of the *Nzo* judgment (which to date has only been followed with regard to dissociation) in conflict with the *Safatsa / Mgedezi* rule (which has been explicitly followed in a number of judgments), *inter alia* the replacement of the element of causation with foresight rather than active association,[20] and allowing for a common design in relation to a series of offences, rather than an active association with a particular crime.[21] It was reasoned that the upshot of the *Nzo* approach was that, flowing from an active association with the aims of the armed struggle coupled with foresight that lives may be lost in achieving these aims, every member of the ANC would have been guilty of murder (and every member of the Manduzini attacking force would be guilty of all the crimes irrespective of knowledge thereof or whether they were present at the scene) – "a consequence not worthy of serious thought".[22] A conflicting rule in *Nzo*, differing from the *Safatsa / Mgedezi* application, further raises the possible constitutionally problematic conundrum of differing results for differing accused, depending on which rule is applied.[23]

The court proceeded to examine the reliance by Hefer J.A. in the majority judgment in *Nzo*[24] on the *dictum* of Holmes J.A. in *S. v. Madlala*:[25]

> "[A]n accused may be convicted of murder if the killing was unlawful and there is proof –
> ….(c) that he was party to a common purpose to commit some other crime, and he foresaw the possibility of one or both of them causing death to someone in the execution of

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16 *ibid.*, 8H.
17 *ibid.*, 11I; for criticism of this judgment see Jonathan Burchell (1990) 3 South African Journal of Criminal Justice 345.
18 *Mzwempi* (n.7),[94].
19 *ibid.*, [105].
20 *ibid.*, [107].
21 *ibid.*, [109].
22 *ibid.*, [111].
23 *ibid.*, [112].
24 *Nzo* (n.12), 7C-D, 8E-H.
25 *S. v. Madlala*, 1969 (2) SA 637 (Supreme Court of South Africa, Appellate Division), 640G-H.

> the plan, yet he persisted, reckless of such fatal consequence, and it occurred…[26]"

Alkema J. commented that Hefer J.A. relied on this dictum "as authority for the proposition that foresight, coupled with an active association in the grand design of the common purpose, constitute sufficient grounds for liability under the common purpose rule", and that given the subsequent development in the law relating to common purpose liability, this reliance on the *Madlala* dictum is "problematic".[27] The court held further[28] that the *Madlala* dictum merely acknowledges that where in the course of the commission of a crime by those who have a common purpose (such as robbery), and certain harm (such as loss of life) is foreseen by the participants, liability for the foreseen harm (killing) could ensue (in the form of murder). "The result will be the same", the court stated, "even when applying the principles in *Safatsa / Mgedezi* and the requirements for liability under the common purpose rule in *Mgedezi*".

The court therefore concluded that *Madlala* cannot be regarded as authority for the approach adopted in *Nzo*, and that the "extended application" approach in *Nzo* ought to be rejected in favour of the *Safatsa / Mgedezi* approach.[29] Moreover, the court reasoned, in the light of the decision in *Thebus*, the judgment in *Nzo* no longer constitutes binding precedent.[30]

C. Prior agreement or active association?

There are some difficulties with this conclusion. As noted above, common purpose may arise either on the basis of a prior agreement or on the basis of active association.[31] For liability based on a prior agreement, the accused need not be at the scene of the crime, nor need he actively participate in the criminal conduct – "[p]rovided that the conduct imputed to him falls within the common design or the execution of the agreement, and that he had the necessary *mens rea* … he may be held liable under the common purpose rule".[32] Where there is a prior agreement, any conduct which falls within the "wide and general common design" may be imputed to the other participants in the common purpose, whereas in the case of active

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[26] See *S. v. Malinga and others*, 1963 (1) SA 692 (Supreme Court of South Africa, Appellate Division), 694F-H, 695. (Reference in original judgment.)

[27] *Mzwempi* (n.7),[115].

[28] *ibid.*, [116].

[29] *ibid.*, [117].

[30] *ibid.*, [118].

[31] *ibid.*, [124]; *Mgedezi* (n.2), 705-6; *S. v. Mitchell and another* [1991] ZASCA 142, 1992 (1) SACR 17, 21-23.

[32] *Mzwempi* (n.7), [54].

association common purpose the conduct imputed appears to be restricted to particular conduct.[33]

Whilst Alkema J. regards the application of the common purpose doctrine in *Nzo* as one based on active association, this determination is open to challenge. The majority judgment in *Nzo* emphasizes that, in the context of a "terrorist campaign" the appellants participated in the execution of a "common design".[34] The purpose of the appellants was to participate in acts of sabotage, using explosives and other lethal weaponry.[35] This was not in dispute. Having established this, the further question was whether, in the course of the execution of their agreed common purpose, they foresaw the possibility of having to execute informers who posed a threat. This approach accords with the dictum from the earlier case of *S. v. Motaung*:[36]

> "[I]f it is established that all the members of a gang have agreed that murders are to be committed in the furtherance of the group objects, the mandate given by each to the others may be so wide as to make each liable for all gang murders, even if the individual charged with such a murder took no part in its planning or commission and even if he did not know that it was going to be committed. But the evidence would have to be so strong and clear that the mandate was indeed so wide and that it subsisted in that wide form when it was committed."[37]

The minority judgment in the *Nzo* case was delivered by Steyn J.A., who held that the appellants should be acquitted, as there was no proof that there was a common purpose between the appellants and the killer of the deceased to murder her. This approach appears not to recognise that provided there was a common purpose to commit an offence, it would suffice if the appellants foresaw the possibility of death ensuing (as held in *Madlala*). The principle set out in *Madlala* has been applied in numerous cases over the years in South African law and remains good law. Thus, for example, where the accused engaged in a common purpose to commit housebreaking with intent to commit a crime (*S. v. Maelangwe*[38]) or robbery (*S. v. Ndaba*[39]), having foreseen the possibility of death occurring during the course of committing the crime, liability for murder could result (citing *Madlala*, as confirmed in *Mzwempi*[40]).

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33 *ibid.*, [56].

34 *Nzo* (n.12), 7C.

35 See the dictum from the court *a quo* cited at *ibid.*, 4G-H, as well as the dictum at *ibid.*, 7H-J, cited *ante.*

36 *S. v. Motaung and another*, 1961 (2) SA 209 (Supreme Court of South Africa, Appellate Division).

37 *ibid.*, 210H-211A.

38 1999 (1) SACR 133 (Northern Cape High Court).

39 2003 (1) SACR 364 (Supreme Court of South Africa, Witwatersrand Local Division).

40 (n.7), [116].

D. Lesotho, Namibia and Zimbabwe

The common purpose doctrine is part of the law relating to participation in a crime in Lesotho, and frequently appears in the reported decisions, although the Court of Appeal warned, in one decision (*Maboka v. R.*[41]), that "there is no magical power contained in the doctrine of common purpose"[42] and therefore that the courts should be cautious not to convict an innocent person for crimes committed by others, "for such is the inherent danger of the doctrine of common purpose".[43]

The South African criminal law, springing from the same common law sources as the Lesotho law (Roman-Dutch law and English law), has been very influential in the development of the Lesotho law. In the context of the common purpose doctrine, the judgment in *Madlala*, and in particular the dictum of Holmes J.A. cited *ante*,[44] is a leading source, oft-cited by the Court of Appeal (see *Mabaso v. R.*;[45] *Saba v. R.*;[46] *Molise v. R.*;[47] *Ramaema v. R.*;[48] *Molelle v. R.*; *R. v. Kaloko*[49]). It follows that the decision in *Nzo* is consistent with the Lesotho law.

Since Namibia only received its independence from South African rule in 1990, South African legal precepts could be expected to be very influential. So it is with the doctrine of common purpose. It is clear that the *Safatsa* case is regarded as general authority for the content of the common purpose doctrine (*S. v. Thomas*[50]), and particularly in respect of active association common purpose (*S. v. Amalovu*[51]). It is further noteworthy that in the *Amalovu* case, in the course of the description of common purpose as the attribution of the act of one person to others "so that it is for legal purposes just as if the others too had committed it",[52] cases such as *Malinga*[53] and *S. v. Shaik*[54] are cited in support of this statement. These cases exemplify the approach adopted in *Madlala*.

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41 *Maboka and another v. R.* [2000-2004] LAC 1 (Lesotho Court of Appeal).
42 *ibid.*, 18E-F.
43 *ibid.*, 18G-H (Ramodibedi J.A.).
44 *Madlala* (n.25), 640G-H.
45 *Mabaso and another v. R.* [1980-1984] LAC 256 (Lesotho Court of Appeal), 258-259.
46 [1995-1999] LAC 1, 10H-I.
47 *Molise and others v. R.* [2000-2004] LAC 491 (Lesotho Court of Appeal), [36].
48 [2000-2004] LAC 710, [85].
49 *Molelle and others v. R.; R. v. Kaloko and others* [2005-2006] LAC 353 (Lesotho Court of Appeal), [25].
50 *S. v. Thomas and others* [2007] NAHC 23, 2007 (1) NR 365, [42].
51 *S. v. Amalovu and another* [2005] NAHC 19, 2005 NR 438, 439I-J.
52 *ibid.*, 439H.
53 (n.26.)
54 *S. v. Shaik and others*, 1983 (4) SA 57 (Supreme Court of South Africa, Appellate Division).

Zimbabwean criminal law, which derives from similar antecedents, has also been influenced by South African precepts. With regard to common purpose it is also clear that the approach adopted in *Nzo* accords with Zimbabwean legal precedent: where there is an agreed criminal purpose to murder, it does not matter that the circumstances in which individual members of the group do so are not known in advance by other group members (*S. v. Nhiri*[55]; *S. v. Bvuure*[56]) although there cannot be liability in these circumstances without such common purpose (*R. v. Nemashakwe*[57]).

E. Concluding remarks

It is submitted that the *Mzwempi* court's concern about the potential effect of the *Nzo* precedent on the decision that it had to make was misguided. Once it had determined that there was no proof of a prior plan involving the appellant, there could be no common purpose liability on the basis of *Nzo*, and given the further factual findings, the decision to overturn the conviction is ineluctable. The tenets of the so-called *Safatsa / Mgedezi* rule do not apply directly to the *Nzo* decision, and neither does the *Thebus* judgment, where the Constitutional Court specifically addressed the issue of the constitutionality of active association common purpose. In contrast, prior agreement common purpose, in the words of the court in *Mzwempi*,[58] founds criminal liability for "any conduct which falls within the wide and general common design", provided that *dolus eventualis* can be established. In this regard, in *Nzo* it was held that the appellants had foreseen the possibility of the victim's murder, and that this fact was not seriously challenged by their counsel.[59]

The decision in *Nzo* raises the spectre of excessively wide liability, particularly in the context of membership of an organization with unlawful aims. However, it is clear that in applying this approach South African courts would entirely agree with the approach of the Supreme Court of India in the recent cases of *Arup Bhuyan v. State of Assam*[60] and *Sri Indra Das v. State of Assam*[61] in not basing criminal liability on mere membership of a banned organization, without at least *dolus eventualis* in relation to the harm that members of the organization may bring about.

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55 1976 (2) SA 789 (Supreme Court of Rhodesia), 791B-C.
56 1974 (2) SA 24 (Supreme Court of Rhodesia) 25.
57 1967 (3) SA 520 (Supreme Court of Rhodesia), 523F-H.
58 *Mzwempi* (n.7), [56].
59 *Nzo* (n.12), 5J.
60 [2011] INSC 100 (February 3, 2011).
61 [2011] INSC 125 (February 10, 2011); both these Indian cases are discussed in Atli Stannard, "Mere Membership of a Banned Organisation Cannot Carry Criminal Liability" [2011] J.C.C.L. 157.

Furthermore, it bears noting that the Constitutional Court in *Thebus* has given its stamp of approval to the more controversial form of common purpose liability, liability based on active association, which requires the fulfilment of additional requirements before the conduct of others in the common purpose can be imputed to the accused. It follows that prior agreement common purpose will surely pass constitutional muster. Given the "significant societal scourge" of serious crimes committed by "collective individuals acting in concert",[62] given that "collaborative misdeeds strike more harshly at the fabric of society",[63] and given that common purpose does not invade a constitutionally protected right "to a degree disproportionate to the need and objective of crime control",[64] it seems that the common purpose doctrine will remain a feature of South African criminal law. This also applies to the *Nzo* judgment (notwithstanding the strong hint in *Mzwempi* that, since the judgment was delivered in the pre-constitutional period, it may not pass constitutional muster, along with the reference to Burchell's eloquent criticism of the judgment[65]).

The common purpose doctrine is certainly susceptible to criticism, as is the judgment in *Thebus*.[66] However, the decision of the court in *Nzo* was entirely consistent with the both the rules and policy underlying the common purpose doctrine, which has now been given the Constitutional Court's imprimatur in *Thebus*. If it is appropriate to employ the common purpose doctrine to counter concerted crimes of violence such as robbery, then no objection can surely be raised in using it to deal with members of an organized group who foresee the possibility of death arising from the unlawful goals of the group, even if such goals envisage a series of offences rather than a particular offence.

Perhaps it is appropriate to conclude with an example proffered by Alkema J. in *Mzwempi*.[67] Where a bank robbery is planned (common purpose by prior agreement), and all the robbers foresaw the possibility of death occurring (even if this was not directly intended) and continued in their course of conduct (thus fulfilling the requirements for *dolus eventualis*), then if death occurred in the ensuing shootout, all the robbers would be liable for murder on the basis of the common purpose, irrespective of whether they were involved in the actual shooting, or even present when it occurred. This is

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62 *Thebus* (n.5), [34].
63 *ibid.*, [40].
64 *ibid.*, [48].
65 *ibid.*, [113].
66 see Jonathan Burchell, *South African Criminal Law and Procedure* (4th edn, Juta 2011), vol. I, "General Principles of Criminal Law", 495 ff. for thoroughgoing criticism of both the doctrine and the *Thebus* judgment.
67 *Mzwempi* (n.7), [116].

undoubtedly correct (see *S. v. Lungile*[68] and, for similar reasoning in a different factual context, see *S. v. Yelani*[69]). In the absence of the prior agreement, along with foresight of the possibility of the harm occurring and continuation in the course of conduct, however, there can be no liability. And this was the approach adopted by the majority in *Nzo*, on the strength of the precedent in *Madlala*, which was, given the factual findings, entirely consistent with the requirements of prior agreement common purpose liability.

SHANNON HOCTOR*

COMMON PURPOSE LIABILITY IN NEW ZEALAND

R. v. Edmonds [2011] NZSC 159 (December 20, 2011) Supreme Court of New Zealand

joint criminal enterprise – murder – mens rea

A. Introduction

In common with other jurisdictions, New Zealand adopts a position that extends liability for group action such that the normal approach to individual liability – *i.e.* a person is condemned for what he has done – is modified on the basis that membership of the group may be a valid reason for imposing criminal liability on each member of the group for the actions of any other member of the group. The tension between the basic principle of individual fault and this approach to group liability may be the reason for the frequency of cases exploring the limits of this form of liability. The New Zealand Supreme Court has recently ruled on the approach to be followed in New Zealand in *R. v. Edmonds*,[1] which, as with many cases in other jurisdictions, involved a group assault leading to a death, and raised the question of what had to be proved against the secondary parties for them to be criminally responsible for the homicide.

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68 *S. v. Lungile and another* [1999] ZASCA 96, 1999 (2) SACR 597.

69 [1988] ZASCA 145, 1989 (2) SA 43, 46F-G

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1 [2011] NZSC 159.

B. Legislative background

1. Party liability

New Zealand has a codified criminal law.[2] In relation to party liability, section 66 provides:

> "*Parties to offences*
> **66.**-(1) Every one is a party to and guilty of an offence who—
> (a) actually commits the offence; or
> (b) does or omits an act for the purpose of aiding any person to commit the offence; or
> (c) abets any person in the commission of the offence; or
> (d) incites, counsels, or procures any person to commit the offence.
> (2) Where 2 or more persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is a party to every offence committed by any one of them in the prosecution of the common purpose if the commission of that offence was known to be a probable consequence of the prosecution of the common purpose."

The *mens rea* for a secondary party under section 66(1) is established as being intention as regards his own conduct, and knowledge of the essential facts of the criminal conduct of the principal.[3] The provisions of section 66(1)(b) to (d) are easy to comprehend from the perspective of individual fault and liability: the secondary party has carried out actions that make it fair to say that the principal is acting as the agent of the secondary party. The principal shares this responsibility in this setting. One may also be an innocent agent – whereby the principal commits a crime by duping someone into carrying out a criminal act on his behalf; the agent does not have criminal responsibility.[4] To complete the picture, there is accessory after the fact liability under section 71 – though this is different from party liability for the offence committed by the principal, because the liability arises from the giving of assistance to the criminal.

Section 66(2) is a form of extended liability because an offence that is not intended either directly or obliquely (using the commonly accepted definition of oblique intention being that which is known to

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2 Section 9 of the *Crimes Act* 1961 indicates that there are no common law crimes. Common law defences, however, survive (s.20) and there are occasions when the offence is not defined and the common law has to fill the gap (*e.g.* s.310 sets the penalty for conspiracy, but does not define it).

3 A.P. Simester, W.J. Brookbanks, *Principles of Criminal Law*, (3rd edn, Thomson Brookers 2007), 187-192.

4 *R. v. Paterson* [1976] 2 N.Z.L.R. 394 (New Zealand Court of Appeal).

be a virtual certainty[5]) will be laid at the door of a person by virtue of membership of a group if it is known to be a probable consequence. This spreads the net wider than section 66(1): knowledge of the essential matters of the offending is a higher standard than knowledge of a probable consequence.[6]

The contrast between an individual acting alone and as a member of a group is stark: the standard for undesired but foreseen consequences for an individual criminal charged with a crime of intent is that it must be a virtual certainty, but if there is a group action the standard for a secondary party is knowledge of probable consequences.

2. Homicide

The *Crimes Act* 1961 also codifies the law of homicide. The *actus reus* involves an unlawful act or an omission to perform a legal duty that results in a death (ss.158-160). What differentiates murder from manslaughter is the *mens rea*: section 171 provides that a culpable killing that is not murder is manslaughter (though there is an exception for infanticide). As for the *mens rea* for murder, section 167 (reflecting its common law origin) allows a conviction if the person "means to cause ... death", or intends to cause bodily injury "known ... to be likely to cause death" and a willingness to run that risk. There is also a statutory version of constructive malice: it is murder if an act known to be likely to cause death is done for an unlawful purpose (s.167), or and if there is an intent is to cause grievous bodily harm in order to facilitate various serious offences or to prevent apprehension in relation to any offence, or to stupefy anyone for these purposes (s.168).

It is worth noting, given the context of the discussion about the extended scope for accessorial liability under section 66(2) of the 1961 Act, in contrast to the limited meaning of "intention" in relation to an individual acting alone, that sections 167 and 168 provide an extended *mens rea* for murder: the *actus reus* of murder, causing the

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5 *R. v. Woollin* [1999] 1 A.C. 82 (House of Lords); this is commonly accepted to represent the meaning of intention when used in a New Zealand criminal context.

6 In *Edmonds* (n.1), [25] (William Young J., judgment of the court), Young J. gives the following example of the difference:

> "If the charge is murder, the party will thus be liable only if he or she assisted the principal … with the knowledge that the principal … would act with murderous intent. On the other hand, if section 66(2) is invoked, the Crown need only establish that the party recognised that an assault with murderous intent was a probable consequence of the implementation of the common purpose."

He noted that the prosecution in a group violence case will usually rely on common purpose liability rather than aiding and abetting.

death of the victim by an unlawful act or omission, can be accompanied by mental states that are far less than an intention to cause that death. This extended *mens rea*, combined with the extended provision for accessorial liability, might mean that a person could be a secondary party to a murder, with a *mens rea* that was far removed from having any intention as to the death of the deceased. However, it is fair to say that the *mens rea* in New Zealand law is restricted in comparison to English law, where an intention to cause grievous bodily harm will always be sufficient:[7] it is only sufficient in New Zealand if section 168 applies, since otherwise there must be at least knowledge of the likelihood of death.

C. The facts in Edmonds

The case involved a death by stabbing inflicted by one of a group of five men. The principal was convicted of murder; three other members of the group, including Edmonds, were convicted of manslaughter (having been charged with murder) on the basis of section 66(2) liability. The fifth man was beyond the jurisdiction. Edmonds had driven a car to the top of a driveway; whilst the others in the group had decamped with his encouragement to chase the victim, Edmonds had stayed at the top of the driveway, armed with a gun. The stabbing occurred at the end of the chase, after three of the group members had given up on it.

D. Appellate history

In relation to the homicide charge, Asher J. had directed the jury that they had to be satisfied: (i) that there was a common purpose to cause serious violence to someone in the group being pursued and to assist each other in that purpose; and (ii) that a killing was a probable consequence. He gave further guidance on the second part of the direction, to the effect that a probable consequence was one that "could well" happen in that there was a "real and substantial" risk of it; and that the necessary degree of foresight arose if there was knowledge that the principal was carrying a weapon at the time the common unlawful purpose began. The judge had heard argument on this final point. The contention for those charged on a party liability basis had been that the jury should be directed that knowledge that the principal was carrying a knife was required. He rejected this, commenting:

> "where there is a range of weapons identified as being in contemplation that were obviously able to inflict a fatal wound, the secondary party should not escape liability because of a

7 *R. v. Cunningham* [1982] A.C. 566 (House of Lords).

> difference in the weapon used from that which the principal party in the group was seen carrying. Death caused by the use of a deadly weapon could well happen. Thus, I conclude that a generic reference to knowledge that weapons were being carried is sufficient, without weapons being further defined."[8]

In the Court of Appeal (*R. v. Pahau and others*[9]), Ellen France J., giving the judgment of the court, dismissed the argument that a proper direction would have been that knowledge was required that the principal had a knife:

> "the group set out not just to assault but to inflict serious violence. In those circumstances, to require knowledge of the actual weapon would undermine the purpose of section 66(2)".[10]

Indeed, the court commented that Asher J. had been too generous to the appellants:

> "We consider that it was sufficient for the judge to direct the jury that the party must know that there was a likelihood of serious harm, and on the facts of the case there was sufficient evidence for the jury to infer that likelihood without also having to infer that the party had actual knowledge of a weapon subsequently used".[11]

E. The issue in the Supreme Court

In the Supreme Court, the focus was again on whether the jury should have been directed that knowledge was required that the principal had a knife. The court indicated at the outset:

> "The appellant's complaint is that the judge was required to, but did not, direct the jury that they could only find the appellant guilty of manslaughter if sure that the appellant had known that Pahau was carrying the specific weapon used – a knife. The issue raised by this appeal is of the same kind as those addressed in a line of decisions which are sometimes referred to as the 'knowledge-of-the-weapon' cases".[12]

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8 *Edmonds* (n.1), [15].

9 [2011] NZCA 147.

10 *ibid.*, [49].

11 *ibid.*, [50].

12 *Edmonds* (n.1), [2]. Young J. also noted that the facts were probably not the right ones to illuminate the question: "... We have some reservations as to whether there was, in the factual context of this case, much difference in substance between the direction as given and the direction which the appellant maintains should have been given" (*ibid.*, [12]). The reason for this was that it was very likely that the jury would have been satisfied as to knowledge that the principal had a knife. The common purpose involved, it should be noted, was the pursuit and the serious violence that was to be inflicted on those being chased – so very short in time and involving a specific, high level of criminality.

The court's dismissal of the appeal ultimately depended on the application of the domestic legislation, but there was also a discussion of the approach taken in England and Wales, Canada and Australia.

1. Application of New Zealand law

The central conclusion was that as a matter of statutory interpretation, section 66(2) did not require the jury to be satisfied that Edmonds was aware that the principal had a knife. Explaining this, William Young J. noted:

> "The approach of New Zealand courts to common purpose liability must be firmly based on the wording of section 66(2). That section recognises only one relevant level of risk, which is the probability of the offence in issue being committed. If the level of risk recognised by the secondary party is at that standard, it cannot matter that the actual level of risk was greater than was recognised. It follows that there can be no stand-alone legal requirement that common purpose liability depends on the party's knowledge that one or more members of his or her group were armed or, if so, with what weapons. As well, given the wording of section 66(2), there is no scope for a liability test which rests on concepts of fundamental difference associated with the level of danger recognised by the party. All that is necessary is that the level of appreciated risk meets the section 66(2) standard".[13]

That disposed of the point of law, but the court went on to record that the state of the evidence might require a direction that the jury be satisfied that the defendant knew of the presence of a weapon if that were relevant to the content and probable consequence of the common purpose: "Where the alleged party can be shown to have known of the presence of weapons when the fracas started, it will usually be easy to infer that he or she was party to a common purpose which extended to the use of those weapons".[14] Whilst accepting that there might be cases when the principal used a weapon that other group members were not aware of, such that the common purpose did not include the attack the principal carried out, the court concluded that knowledge of the nature of the weapon – as opposed to the fact that there was a weapon – would invariably be irrelevant:

> "providing the Crown can establish a relevant and sufficient common purpose and a recognition that the offence

[13] *ibid.*, [47].

[14] *ibid.*, [50]. The judge did not state expressly that it will always be a question on the facts, but his language that "it will usually be easy to infer" makes it clear that it must be a matter for the jury as to what they make of the facts, and there may be circumstances where the usual inference is not made.

> ultimately committed was a probable consequence of its implementation, it is difficult to conceive of a situation where the nature of the weapon used would be of controlling significance in determining whether the offence occurred in the course of implementing the common purpose".[15]

2. Discussion of the law elsewhere

The leading Canadian and Australian cases were said by the court to support its construction of New Zealand law, but the approach taken in England was distinguished. William Young J. considered *R. v. Powell*; *R. v. English*,[16] and commented that the concern of the House of Lords was that secondary parties should not be convicted of murder if they had not foreseen the risk of death, and accordingly endorsed a rule that the secondary party should be aware that the principal had a particular weapon or one that was equally lethal because "such a requirement would serve as a proxy (albeit rather rough) for a rule that party liability for murder depends on actual foresight of the likelihood of death", even though it was accepted that there was no such rule in the common law.[17] William Young J. also noted the clarification of this decision in *R. v. Rahman*,[18] where Lord Brown observed that:

> "If B realises (without agreeing to such conduct being used) that A may kill or intentionally inflict serious injury, but nevertheless continues to participate with A in the venture, that will amount to a sufficient mental element for B to be guilty of murder if A, with the requisite intent, kills in the course of the venture *unless (i) A suddenly produces and uses a weapon of which B knows nothing and which is more lethal than any weapon which B contemplates that A or any other participant may be carrying and (ii) for that reason A's act is to be regarded as fundamentally different from anything foreseen by B*."[19]

The explanation for this approach was said by William Young J. to be:

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15 *ibid*., [51].

16 [1999] 1 A.C. 1 (House of Lords).

17 *Edmonds* (n.1), [34].

18 [2009] 1 A.C. 129 (House of Lords). The main point in *Rahman* related to the *mens rea* of the secondary party, *i.e.* whether it was necessary to foresee the intention of the principal or the action of the principal: *Edmonds* (n.1), [36]. It was held to be the latter: *Rahman*, [23]-[25] (Lord Bingham), citing authority and two rationales for favouring that authority, *viz*. the difficulty for a jury in assessing what the secondary party knew about the intention of the principal, and the need not to undermine the law as to the *mens rea* of murder (*i.e.* an intention to cause serious harm, not necessarily to kill).

19 *Rahman* (n.18), [68]; quoted in *Edmonds* (n.1), [39].

> "a response to the potential for over-criminalisation of secondary parties in group violence cases [which] has involved limiting common purpose principles so as to exclude liability where the risk which crystallised was fundamentally greater than, and different to, that envisaged by the alleged party."[20]

He then made plain that questions about whether the secondary party had knowledge of the weapon to be used – as in *Edmonds* – missed the real point, which was knowledge of the magnitude of the risk of death. That turned on many factors, and the nature of the weapon might well be of limited weight in assessing the risk of death, since emotional arousal or the disinhibiting effects of alcohol or drugs, and questions of what the principal was likely to do with whatever weapon he had, would be far more important. Accordingly, the court encouraged, for the sake of consistency, an approach that invited the jury to consider whether what happened was fundamentally different from what had been envisaged as the common purpose, rather than concentrating on the nature of the weapon actually used in the killing.[21] He also suggested that the over-criminalisation concerns evident in the approach of English judges did not apply in New Zealand, because the *mens rea* requirements in New Zealand meant that "there is very limited scope for section 66(2) liability for murder where the secondary party has not recognised the probability of death resulting from the implementation of the common purpose".[22]

F. Comment

The ruling and comments of William Young J. seem eminently sensible on the point that was argued. In common purpose liability, the central *actus reus* issue is the scope of the joint enterprise, and the *mens rea* is knowledge that the outcome that was a probable consequence of the common purpose. Given that both the scope of the joint enterprise and the knowledge of each member of the group will often be a matter of inference, the focus should be on the risk of the outcome and the secondary parties' knowledge of that risk. That in turn means that questions such as whether the principal produced and used a weapon that none of the others in the group knew about will be an evidential matter going to the risk of the outcome.

There is, however, a broader issue, namely whether the wide common purpose rule is necessary, or expands criminal liability too far, with a much reduced *mens rea*, founded merely on participation in

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20 *Edmonds* (n.1), [44].
21 *ibid.*, [45], [46].
22 *ibid.*, [44].

a criminal group. There are two aspects to this. First, the form of the rule. In New Zealand, it is statutory, so a matter for the legislature. In England and Wales, it is a common law rule,[23] amenable to change by the judiciary – but it may be so well established that reform would require legislative intervention.

Secondly, if it is accepted that participation in a group justifies extending liability in this way, how wide should the net be cast? In *Chan Wing-Sui v. R.*,[24] Sir Robin Cooke explained the basis of such liability, and contrasted it with liability as an aider and abettor:

> "… a person acting in concert with the primary offender may become a party to the crime, whether or not present at the time of its commission, by activities variously described as aiding, abetting, counselling, inciting or procuring it. In the typical case in that class, the same or the same type of offence is actually intended by all the parties acting in concert. … [There is a] wider principle whereby a secondary party is criminally liable for acts by the primary offender of a type which the former foresees but does not necessarily intend. … It turns on contemplation or ... authorisation, which may be express but is more usually implied. It meets the case of a crime foreseen as a possible incident of the common unlawful enterprise. The criminal culpability lies in participating in the venture with that foresight."[25]

As to the level of foresight, Sir Robin reviewed cases from Hong Kong, Australia and New Zealand, finding that all that was required was that the offence committed by the principal was seen as something that could well happen; he held this was necessary for policy reasons – to make criminal those who lend their participation to a criminal enterprise.[26] Amongst the cases cited was *R. v. Gush*,[27] in which the New Zealand Court of Appeal had determined that "probable" in section 66(2) of the *Crimes Act* 1961 does not mean more probable than not, but instead that there is a "substantial or real risk",

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[23] The Law Commission proposed putting the doctrine on a statutory footing: see "Participating in Crime" (Law Com. no. 305, May 2007), but Part 2 of the *Serious Crime Act* 2007 deals only with the inchoate offence of encouraging or assisting an offence, not the question of secondary liability.

[24] [1985] A.C. 168 (Privy Council).

[25] *ibid.*, 175G-H.

[26] *ibid.*, 176C-177E.

[27] [1980] N.Z.L.R. 92. The court also considered the meaning of the words "likely to cause death" in the *Crimes Act* 1967, s.167, *i.e.* the *mens rea* for homicide, and suggested – *obiter* - that this also means a real risk rather than that something is more likely than not. This was later held to be correct: see the judgment of Cooke P. in *R. v. Piri* [1987] 1 N.Z.L.R. 66 (New Zealand Court of Appeal) that "likely to cause death" involves a real risk rather than that something is more likely than not. He noted that a risk that is negligible in the eyes of the offender does not merit the stigma of a conviction for murder: *Piri*, 79. This reasoning would apply to section 66(2).

or that something "could well happen": this was the basis for the ruling of Asher J. in *Edmonds* (noted *ante*), and was not challenged on appeal. The rationale for the holding in *Gush* was that the purpose of section 66(2) would be frustrated by any other interpretation.

This means that guilt as a secondary party may arise from foresight of a risk that is beyond negligible. This is in stark contrast with what the judges have held is required for a principal acting intentionally: only foresight of a virtual certainly will suffice as an alternative to a direct intent. Are the policy reasons for incentivising people not to join in a criminal group so strong as to justify this?

William Young J. was particularly critical of the English and Welsh approach, commenting that English judges had been led down a false path because of concerns about the risk of over-criminalisation (see *ante*). He suggested that the New Zealand position was different, since the *mens rea* requirements for murder give limited scope for section 66(2) liability for murder where the secondary party has not recognised the probability of death.[28] But New Zealand law is not immune from this criticism, given that the "probability of death" means merely the non-remote possibility of death. The breadth of the position in New Zealand law may explain one of the imponderables in *Edmonds*, namely why were the secondary parties convicted of manslaughter rather than murder? This seems to have been a jury verdict. Given that the group were intent on serious violence, a real risk of death would seem to have been foreseeable – in which case, the jury verdict against the secondary parties should have been of murder, since there was clearly a plan to inflict serious injury. A verdict of manslaughter may be explicable as a jury view that this was a fairer way of stigmatising those who participated but were not the principal.

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[28] *Edmonds* (n.1), [44].

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